

Review Essay

Beyond the Carceral State

CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS. By Marie Gottschalk. Princeton, New Jersey: Princeton University Press, 2015. 502 Pages. \$35.00.

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The vast expansion of carceral control in the United States is the subject of a compelling body of scholarship, but efforts to decarcerate have received relatively little attention. One of the few studies to focus in depth on the prospects of carceral reform, political scientist Marie Gottschalk's brilliant and unsettling book, Caught: The Prison State and the Lockdown of American Politics, ultimately concludes that contemporary reform efforts are woefully inadequate to their task. Though certain constituencies have been motivated to pursue reform by budget deficits, decarceration efforts compelled by cost-cutting pressures alone are unlikely to bring meaningful change. Bipartisan attempts to reduce sentences for minor drug offenses, Gottschalk argues, will also fail to transform U.S. carceral practices, because the vast majority of people incarcerated are not convicted of low-level drug crimes. As such, Gottschalk contends, the carceral state is well on its way to becoming our new normal. A significant part of the problem, according to Gottschalk, is the absence of any inspiring, long-term vision for reform against which near-term efforts and compromises may be assessed. In an attempt to imagine a way beyond our carceral state, taking Gottschalk's important critical analysis as a starting point, this Review Essay explores potential openings in contemporary criminal law reform efforts. Disaggregating various ongoing reform projects, this Essay argues that one contemporary reform effort motivated primarily by cost-cutting threatens to disguise and further embed current penal practices in ways even more destructive than Gottschalk describes; yet other ongoing reform initiatives could enable a more substantial reckoning with our carceral state over the long term. Taking seriously Gottschalk's claim that contemporary reform efforts are limited by the absence of a long-term vision, this Essay explores more aspirational accounts of decarceration that could orient near-term reform, including Finland's dramatic decarceration and the Black Lives Matter movement in the United States.

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Introduction

One might have hoped that, by this hour, the very sight of chains on black flesh, or the very sight of chains, would be so intolerable a sight for the American people, and so unbearable a memory, that they would themselves spontaneously rise up and strike off the manacles. But, no, they appear to glory in their chains; now, more than ever, they appear to measure their safety in chains and corpses.

—James Baldwin, “An Open Letter to My Sister, Miss Angela Davis”¹

What is the future of our carceral state? Over two million men, women, and children are imprisoned in the United States—more than any other country in the world, at any time in history.² Carceral control extends not only to those 1 in 36 U.S. citizens under criminal supervision of some form, but to countless others, disproportionately African-Americans and Latinos, subject to aggressive policing and the civil consequences of conviction.³ During the 1990s, as a new prison opened in a rural location in the United States every fifteen days—245 new prisons that decade—a particular form of governance also took shape.⁴ Our carceral state is now

1. James Baldwin, *An Open Letter to My Sister, Miss Angela Davis*, N.Y. REV. BOOKS, Jan. 7, 1971, at 15, 15.

2. MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 1 (2015).

3. *Id.* at 1–2 (examining the number of people under criminal supervision and the civil consequences of conviction); DANIELLE KAEBLE ET AL., U.S. DEP’T JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 2014, at 1 (2016), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf> [https://perma.cc/YD4N-5MSS]; Paul Butler, *Stop and Frisk: Sex, Torture, Control*, in *LAW AS PUNISHMENT/LAW AS REGULATION* 155, 155–58 (Austin Sarat et al. eds., 2011) (discussing aggressive racialized policing tactics).

4. Tracy Huling, *Building a Prison Economy in Rural America*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 197, 198 (Marc Mauer & Meda

marked by the central role of criminal law's processes and logics across numerous domains of public life.⁵ And while the carceral state privileges penal intervention as a favored sphere of governmental action—trading heavily on fear-mongering and punitiveness to legitimate governmental authority—the market and economic spheres have been imagined to be spaces where government is less welcome.⁶ Containment, policing, and punishment serve as responses to concentrated poverty, instability, and interpersonal harm. It appears that we continue to measure our “safety in chains and corpses,” as James Baldwin observed of Americans years ago.⁷

While this vast expansion of carceral control in the United States is the subject of a compelling body of scholarship, more recent efforts to decarcerate have received far less scholarly attention.⁸ One of the few studies to focus in depth on the prospects of decarceration, Marie Gottschalk's brilliant and unsettling book, *Caught: The Prison State and the*

Chesney-Lind eds., 2002); *see also* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 16–17 (2007) (discussing crime as a governmental rationality).

5. Elections, education, immigration, and public housing are all informed by criminalization. *See generally* INVISIBLE PUNISHMENT, *supra* note 4. Approximately 2.5% of the U.S. voting age population has been disenfranchised by policies that strip people with criminal convictions of the right to vote. *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 76 (2006). Police are a routine presence in public schools, and immigration regulation relies heavily on criminal law enforcement—as does the allocation of government-subsidized housing and other forms of basic welfare assistance. *See* KIMBERLÉ WILLIAMS CRENSHAW ET AL., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED 4–5 (2015) (examining how the school-to-prison pipeline harms African-American girls); KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 52–56 (2011) (discussing the effect of criminal convictions on eligibility to receive government assistance); Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 233 (2012) (discussing the relationship between immigration and criminal law enforcement).

6. *See, e.g.*, BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 41 (2011) (quoting President Ronald Reagan, stating that “government does not belong in the economic sphere, which has its own orderliness, but it has a legitimate role to play outside that sphere, especially in law enforcement”); SIMON, *supra* note 4, at 29–31 (comparing the notion that the government has the power to criminalize conduct as “unquestioned” to the constitutional constraints on the federal government's regulatory power).

7. Baldwin, *supra* note 1, at 15.

8. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60 (2010) (exploring the most significant causes of increased incarceration rates); KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 60 (2010) (concluding that the increase in social-control tools “enhances the reach and power of the criminal justice system”); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 144 (1999) (discussing the racial disparities and increase in drug convictions associated with the war on drugs); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 1–2 (2006) (discussing U.S. incarceration rates and increases in prison populations); HARCOURT, *supra* note 6, at 41 (exploring the relationship between mass incarceration and “tough-on-crime political strategies”); SIMON, *supra* note 4, at 158–59 (arguing that mass incarceration is as a policy solution to “governing through crime”).

Lockdown of American Politics, published in 2014, ultimately concludes that contemporary penal reform efforts are woefully inadequate to their task.⁹ Budget deficits are insufficient to motivate substantial change, Gottschalk explains, given that most criminal law enforcement costs are relatively fixed and protected by entrenched interests.¹⁰ In fact, state expenditures on corrections amount to less than 3% of total state budgets, not even half of what states spend on highways.¹¹ Furthermore, drug law reform, Gottschalk argues, will not substantially reduce incarceration or transform carceral practices because the significant majority of people are not subject to imprisonment for drug offenses.¹² Whereas approximately 53% of individuals sentenced to state prison are incarcerated for offenses classified as violent, only 1% have been convicted of unambiguously low-level drug offenses.¹³ Expressive of an increasingly pervasive scholarly gloom, Gottschalk contends that our carceral state, with its “huge penal system,” is “well on its way to becoming the new normal,” subject only to modest periodic contractions.¹⁴ A significant part of the problem, according

9. GOTTSCHALK, *supra* note 2, at 3, 17–19.

10. *Id.* at 9.

11. *Id.*

12. *Id.* at 5.

13. *Id.* at 169; E. ANN CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014, at 16 (2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf> [<https://perma.cc/QV7Y-WREK>].

14. GOTTSCHALK, *supra* note 2, at 22. In his review in the *Financial Times*, Gary Silverman remarks of Gottschalk's *Caught* that “as a pessimistic person,” he finds “it encouraging to encounter even gloomier souls.” Gary Silverman, *Caught: The Prison State and the Lockdown of American Politics*, FIN. TIMES (Feb. 1, 2015) (book review), <https://www.ft.com/content/dd1ff6dc-a7ce-11e4-97a6-00144feab7de> [<https://perma.cc/6C72-A3CH>]. Gottschalk's account is consistent in this respect with an overwhelmingly pessimistic scholarly resignation regarding the future of U.S. carceral practices. See, e.g., BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 198 (2006) (“The self-sustaining character of mass imprisonment as an engine of social inequality makes it likely that the penal system will remain as it has become, a significant feature on the new landscape of American poverty and race relations.”); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 207 (2005) (“[R]eal change would mean change, not just in punishment practices but in much grander American cultural traditions. It would be foolish to think that such change is coming soon.”); John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. LEGIS. 173, 175 (2015) (explaining that because the war on drugs accounts for less of U.S. imprisonment than is commonly believed, there is even less hope for legislative measures to reduce large-scale incarceration than is often supposed); Louis Michael Seidman, *Hyper-Incarceration and Strategies of Disruption: Is There a Way Out?*, 9 OHIO ST. J. CRIM. L. 109, 110 (2011) (“There is little reason, then, to be very hopeful about the possibilities of change.”). But see HADAR AVIRAM, CHEAP ON CRIME: RECESSION ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2015) (examining the ameliorating influence of the post-2008 economic recession on American penal policies); JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 133–35 (2014) (exploring the recent history of prison litigation in California and arguing that the Supreme Court's opinion in *Brown v. Plata*, 563 U.S. 493 (2011), represents a major breakthrough in American jurisprudence that fundamentally challenges mass incarceration); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 50–51 (2011) (exploring in a modestly less pessimistic register recent reductions in rates of incarceration in the

to Gottschalk, is the absence of any inspiring, long-term vision for reform against which near-term efforts and compromises may be assessed.¹⁵

In an attempt to imagine a way beyond our carceral state, taking Gottschalk's important critical analysis as a starting point, this Review Essay explores both more perilous paths and potential openings in contemporary criminal law reform efforts. The sense of inevitability suggested by Gottschalk's scathing critique may be misplaced, not because of any lack of good reasons for despair, but because there are at least conceivable means of engaging the contemporary popular commitment to criminal law reform toward more transformative ends over the long term.

Though Gottschalk's work makes a vital contribution to our understanding of the shortcomings of proposed reform, she treats quite disparate reform projects as largely of a piece, particularly in their anticipated impotence. As such, Gottschalk undervalues the potential of mounting public outcry to propel change and particularly the significance of the emergent social movement focused on criminal law reform and racial and social justice that has taken shape in recent years.¹⁶

In the aftermath of the tragic killings of African-American citizens in Florida, Missouri, New York, Maryland, South Carolina, Ohio, and elsewhere, following years of unredressed racial violence, this new social movement has called for an end to U.S. carceral practices, proclaiming that Black Lives Matter.¹⁷ Over the past several years, thousands of citizens have taken to the streets in solidarity in cities across the country.¹⁸ Partly in response to public outcry, the Department of Justice launched investigations

United States and obstacles to more significant reform, including a failure of empathetic identification with incarcerated people on the part of middle-class and wealthy white Americans).

15. GOTTSCHALK, *supra* note 2, at 260.

16. See, e.g., *A Vision for Black Lives: Policy Demands for Black Power, Freedom and Justice*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org> [<https://perma.cc/XLF5-ASHV>].

17. See Justin Hansford, *The Whole System Is Guilty as Hell*, 21 HARV. J. AFR. AM. PUB. POL'Y 13, 14 (2015) ("[A] new Black political discourse emerged The moment had become a movement, the spontaneous chants had coalesced into mantras, and these mantras struck with force of an obvious idea that stunningly wasn't obvious: 'Black lives matter' as an assertion of value . . . 'I can't breathe' as a summation of an entire community's state of being."); *infra* subpart II(B).

18. See generally Associated Press, *Chanting "Black Lives Matter," Protestors Shut Down Part of Mall of America*, N.Y. TIMES (Dec. 20, 2014), <http://www.nytimes.com/2014/12/21/us/chanting-black-lives-matter-protesters-shut-down-part-of-mall-of-america.html> [<http://perma.cc/G83B-76MS>]; Benjamin Mueller & Ashley Southhall, *25,000 March in New York to Protest Police Violence*, N.Y. TIMES (Dec. 13, 2014), http://www.nytimes.com/2014/12/14/nyregion/in-new-york-thousands-march-in-continuing-protests-over-garner-case.html?_r=0 [<http://perma.cc/D3NZ-HFHG>]; Jennifer Steinhauer & Elena Schneider, *Thousands March in Washington to Protest Police Violence*, N.Y. TIMES (Dec. 13, 2014), <http://www.nytimes.com/2014/12/14/us/thousands-march-in-washington-to-protest-deaths-by-police.html> [<http://perma.cc/6S59-957P>].

into numerous police departments' and criminal courts' practices.¹⁹ In the months following the publication of Gottschalk's book, the Movement for Black Lives has become a powerful voice in contemporary political discourse, reshaping national conversations about race and criminal law enforcement.²⁰

Gottschalk makes plain that so far these various criminal law reform initiatives have produced minimal change. Yet, in this Essay, I attempt to identify among ongoing reform efforts discrete commitments or currents that threaten particularly pernicious unintended consequences and those that have the potential to bring about more far-reaching transformation. One predominant approach, most notable in Texas, promotes decarceration as a component of a regressive fiscal program, which I will call "neoliberal penal reform"—extending Gottschalk's critical discussion of neoliberalism and criminal law reform. These initiatives disguise but do not abandon current carceral practices, while potentially entrenching overcriminalization and hyperincarceration—in a manner that may be even more destructive than Gottschalk identifies. In fact, meaningful decarceration will cost money as resources must be directed to address social dislocation, unemployment, and violence by means other than criminal law enforcement, and to support individuals and communities devastated by incarceration. Additionally, decarceration efforts rooted primarily in cost-cutting threaten to displace more promising reform, particularly if their destructive entailments are not identified.

19. See generally Matt Apuzzo & Sheryl Gay Stolberg, *Justice Department Will Investigate Baltimore Police Practices*, N.Y. TIMES (May 7, 2015), <http://www.nytimes.com/2015/05/08/us/politics/justice-department-will-investigate-baltimore-police-practices-after-freddie-gray-case.html> [<http://perma.cc/78Y8-GZ7U>]; Richard Pérez-Peña, *The Ferguson Police Department: The Justice Department Report, Annotated*, N.Y. TIMES (Mar. 4, 2015), <http://www.nytimes.com/interactive/2015/03/04/us/ferguson-police-justice-department-report.html> [<http://perma.cc/R4MP-UXP4>]; Mitch Smith & Matt Apuzzo, *Police in Cleveland Accept Tough Standards on Force*, N.Y. TIMES (May 26, 2015), <http://www.nytimes.com/2015/05/27/us/cleveland-police-accept-use-of-force-rules-in-justice-dept-deal.html> [<http://perma.cc/F9ZG-JD5N>]. In its report on the Ferguson Police Department, the Department of Justice concluded that Ferguson police had engaged in a "pattern or practice of unlawful conduct," routinely subjecting African-American citizens to unlawful stops, arrests, and excessive force, among other violations of the First, Fourth, and Fourteenth Amendments to the U.S. Constitution. See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015).

20. See KEEANGA-YAMAHTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION (2016); see also Jay Caspian Kang, *Our Demand is Simple: Stop Killing Us*, N.Y. TIMES MAG. (May 4, 2015), <http://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html> [<http://perma.cc/4U3H-CTB4>] ("[T]he movement has managed to activate a sense of red alert around a chronic problem that, until now, has remained mostly invisible outside the communities that suffer from it. Statistics on the subject are notoriously poor, but evidence does not suggest that shootings of black men by police officers have been significantly on the rise. Nevertheless, police killings have become front-page news and a political flash point, entirely because of the sense of emergency that the movement has sustained.").

A separate approach in contemporary reform, however, centers not only on modestly reducing drug-related incarceration but also on developing an array of related programs including jail diversion, bail reform, reentry support, alternative violence prevention, and restorative justice conferencing. In combination, these projects attempt to more substantially transform U.S. criminal procedures in large part by fostering security through mechanisms other than police and prisons and by attending to racial and economic inequality in criminal law enforcement.²¹ While on their own terms, as Gottschalk persuasively demonstrates, these efforts will not substantially reduce incarceration or predatory criminal law enforcement, these projects could, I will argue, open the door to more thoroughgoing change precisely because their inadequacy may provoke deeper public reflection regarding necessary change. In other words, the gap between mounting public interest in criminal law reform and the impotence of proposed drug law and related reform measures could be the impetus for a broader public reckoning with our carceral state—informed by the critical insights of impacted communities and experts, including Gottschalk’s own work, as well as by the creative and compelling advocacy of the Black Lives Matter movement and other contemporary movements for social, racial, and economic justice.

This is not to deny the enormous obstacles to change that Gottschalk powerfully illuminates. But it remains at least possible to pursue existing pathways to reach more expansive goals. This Essay might be understood, then, as an effort to marshal an optimism of the will over a pessimism of the intellect by attending to how certain currents in contemporary criminal law reform could perhaps serve as an occasion for a public reconsideration of more comprehensive and promising alternative frameworks for carceral change—that is, as an opportunity to envision a form of security not measured “in chains and corpses.”²²

Widespread interest in decarceration should encourage us not only to expose the inadequacy of current reform efforts but also to engage public interest in more effective, farther reaching alternatives. Those committed to dismantling the carceral state could, for example, use the case against solitary confinement, recently endorsed by at least one member of the U.S. Supreme Court and powerfully challenged by 30,000 hunger-striking prisoners in California, as an opportunity to call into question more generally harsh penal practices.²³ Likewise, the commitment to reducing

21. See *infra* subpart II(B), Part III.

22. See ANTONIO GRAMSCI, LETTERS FROM PRISON 159–60 (exploring the importance of both a clear-eyed, honest, critical appraisal of current possibilities—a pessimism of the intellect—and the courage to try to alter those possibilities—an optimism of the will—to attempt difficult things despite the odds).

23. See *Davis v. Ayala*, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring) (noting with approval the historical and contemporary objections to the draconian nature of solitary

drug sentences may be extended well beyond the current and excessively cautious focus on low-level possession offenses by seizing the opportunity of widespread interest in decarceration to underscore the inadequacy of minor drug law reform as a vehicle for meaningfully reducing incarceration and instead exploring other alternatives. It is for this reason that Gottschalk's account may rest on an unduly static view of unfolding political and legal processes when, perhaps, initial limited openings in public discourse could be directed toward more transformative ends.

To identify longer-term visions of decarceration that might orient near-term reform, this Essay begins to explore Finland's dramatic decarceration and the Black Lives Matter movement in the United States. Finland's prison population reduction serves as a case study of the potential cascade effect of efforts to thoroughly reorient penal philosophy and social policy.²⁴ In the mid-twentieth century, in part as a consequence of more than a century of Russian occupation, unrest, and war, Finland faced especially high levels of incarceration, on par with the United States at the time and more akin to its former-Soviet than Nordic neighbors.²⁵ In the intervening years, Finland radically decarcerated. As most other countries' prison populations increased, Finland slashed its imprisonment rate and fundamentally transformed its penal system.²⁶ Finland's decarceration was compelled in part by a collective shame at the outsized scope of its own punitiveness. The sense of disgrace associated with Finland's penal practices motivated not only thorough reform of sentencing laws, but also a reconceptualization of the role of penal policy relative to that of other state-led projects in public life.²⁷ The notion of a social rather than punitive

confinement); Ian Lovett, *Inmates End Hunger Strike in California*, N.Y. TIMES (Sept. 5, 2013), <http://www.nytimes.com/2013/09/06/us/inmates-end-hunger-strike-in-california.html> [<http://perma.cc/Z6RP-89V2>] (discussing the influence of hunger strikes on reforming solitary confinement); Mohamed Shehk, *California Prisoners Win Historic Gains with Settlement Against Solitary Confinement*, S.F. BAY VIEW (Sept. 1, 2015), <http://sfbayview.com/2015/09/california-prisoners-win-historic-gains-with-settlement-against-solitary-confinement/> [<http://perma.cc/WK6C-QDFD>] (same).

24. See Tapio Lappi-Seppälä, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 92, 106–22 (Michael H. Tonry & Richard S. Frase eds., 2001) (discussing the factors that contributed to the decline in Finland's prison population).

25. Ikponwosa Ekunwe & Richard S. Jones, *Finnish Criminal Policy: From Hard Time to Gentle Justice*, 21 J. PRISONERS ON PRISONS 173, 173–76 (2012); see also MARGARET WERNER CALAHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, at 193 (1986) (indicating the U.S. rate of incarceration in state and federal prisons as 117 per 100,000 in 1950 and 126 per 100,000 in 1960); HANNS VON HOFER ET AL., NORDIC CRIMINAL STATISTICS 1950–2010, at 68 (2012) (reporting the Finnish incarceration rate as 187 per 100,000 population in 1950 and as 154 per 100,000 in 1960, compared to 51 and 44 for Norway, and 35 and 65 for Sweden in the same years).

26. Lappi-Seppälä, *supra* note 24, at 106.

27. See PATRIK TÖRNUDD, HELSINKI NAT'L RESEARCH INST. OF LEGAL POLICY, FIFTEEN YEARS OF DECREASING PRISONER RATES 12 (1993) (“[T]hose experts who were in charge of

response to crime is familiar, but the reorientation of state projects and national identity, leading to the largest decarceration in history, is less familiar.

In the United States, in the Black Lives Matter movement, a compelling criminal law reform effort is also taking shape, focused on particular threats to black life, but opening more broadly into a forceful call to dismantle the carceral state and to come to terms with the United States' own national shame.²⁸ What distinguishes this burgeoning movement in the United States, like the movement for decarceration in Finland, is the identification of criminal law reform not only with a fundamental shift in penal policy and criminal procedures, but with a reorientation of the state more generally from regressive and punitive to social ends. These efforts may not result in immediate policy successes, particularly in those jurisdictions presently characterized by a regressive political climate, but these efforts do project a longer-term vision of change and one that could portend fundamental transformation of our carceral state in the perhaps not so distant future.

This Essay unfolds in three parts. Part I begins by further considering Gottschalk's critical account of ongoing criminal law reform efforts. Part II reveals the significant variation between distinct impulses in contemporary criminal law reform efforts, proposing that decarceration efforts motivated primarily by cost-cutting have the potential to do more harm than good, while those efforts concerned with limited drug law and related reform could be expanded to reach more transformative goals. Part III addresses longer term visions of decarceration by exploring the experience of Finland's dramatic decarceration and the Movement for Black Lives in the United States.

I. Mapping the Tenacious Carceral State

Marie Gottschalk's masterful book *Caught: The Prison State and the Lockdown of American Politics* offers a comprehensive critical map of the U.S. carceral state. Her primary argument is that American carceral practices are more impervious to change than most people imagine.²⁹ Gottschalk draws both on the vast literature examining the expansion of the carceral state, including her own earlier work, as well as media coverage and policy reports addressing ongoing reform.³⁰

planning the reforms and research shared an almost unanimous conviction that Finland's internationally high prisoner rate was a disgrace."), *quoted in* Lappi-Seppälä, *supra* note 37, at 140 (adding that this sense of disgrace and support for reform were widely shared among Finland's civil servants, members of the judiciary, prison authorities, and politicians).

28. See *infra* subpart III(B).

29. See generally GOTTSCHALK, *supra* note 2.

30. See generally *id.*; GOTTSCHALK, *supra* note 10 (examining the historical, political, and institutional foundations of the U.S. carceral state and the role of four key movements and

Gottschalk explains that it should be possible, in principle, to greatly reduce incarceration levels without tackling what she calls “structural problems” or the root causes of crime.³¹ After all, as she notes, “a focus on structural problems conflates two problems that are actually quite distinct—the problem of mass incarceration and the problem of crime.”³² While incarceration levels are determined by sentencing laws and policies, crime is generally associated with a wide range of independent factors including underlying social conditions, inequality, concentrated poverty, prevalence of access to legal as opposed to underground economies, drug addiction, and the pervasiveness of guns.³³ Although in principle it should be possible to eliminate excessive carceral practices through straightforward sentencing reform, Gottschalk argues that, given current political conditions, contemporary reform efforts are bound to fail.³⁴ Gottschalk concludes that what is needed to overcome current political obstacles is a “convulsive politics from below.”³⁵ In her account, though, as in most of the related scholarship, this sort of public groundswell is understood to be absent from the contemporary scene, as are any significant prospects for substantial change.³⁶

More specifically, Gottschalk identifies two dominant “frames” in contemporary reform efforts.³⁷ The first frame—which Gottschalk calls the racial justice frame or the *New Jim Crow* frame—is centered on racial injustice in criminal law enforcement.³⁸ The second frame she identifies is the bipartisan consensus to reduce incarceration.³⁹ This second frame focuses on reducing the severity of sentences for drug-related and other minor offenses, though it is sometimes motivated predominantly by a desire to decrease government spending.⁴⁰

Gottschalk reveals that the effects of the various reform efforts associated with these two frames have been quite modest, and she dismisses both as inadequate.⁴¹ She points out that if the United States were to reduce

groups—the victims’ movement, the women’s movement, the prisoners’ rights movement, and opponents of the death penalty—in unwittingly mediating the construction of the carceral state in important ways).

31. GOTTSCHALK, *supra* note 2, at 258–59.

32. *Id.* at 259.

33. *See id.* at 277–79 (discussing the multitude of factors that influence the rate of crime). *See generally* NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 3 (Jeremy Travis & Bruce Western eds., 2014) (explaining the relationship between policy choices and incarceration rates).

34. *See* GOTTSCHALK, *supra* note 2, at 2, 258–60.

35. GOTTSCHALK, *supra* note 2, at 282.

36. *Id.* at 276, 282.

37. *Id.* at 3.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

its incarceration rate by 50%, it would still possess an extraordinarily high incarceration rate of about 350 per 100,000 people, a rate far greater than that of otherwise-similar states.⁴² Reducing the U.S. incarceration rate to its historical norm of 120 to 130 inmates per 100,000 people would entail an approximately 75% reduction in incarceration—a change that currently proposed reforms are powerless to achieve.⁴³

With reform underway in many jurisdictions, the population of prisoners in the custody of the Federal Bureau of Prisons decreased for the first time in 2013, though only by 0.9%.⁴⁴ The total prison population under the jurisdiction of U.S. state and federal authorities at the end of 2013 reflected an increase of approximately 4,300 prisoners over the 2012 total, after several years of decline.⁴⁵ State prison populations in the United States have decreased slightly in the aggregate, with some states reporting more significant decreases and others slight increases.⁴⁶

In Gottschalk's view, the powerlessness of the racial justice frame to alter these trends is twofold. First, Gottschalk is critical of the capacity of the racial justice frame to contribute to meaningful decarceration because of the "gross limitations of oppositional strategies formed primarily around identity-based politics."⁴⁷ Research in social psychology, for example, suggests that white people are more likely to support punitive policies when they are made aware that those punitive measures have racially disparate effects on people of color.⁴⁸ Gottschalk goes on to suggest that reform efforts organized around racial justice elide the political-economic dimensions of carceral practices. As a consequence, Gottschalk argues that the racial justice frame neglects the importance of class and other nonracial factors in the formation of the carceral state.⁴⁹

42. *Id.* at 15.

43. *Id.* at 2, 15 (explaining that a reduction in prisoner population to 120 to 130 inmates per 100,000 people would reduce the current incarceration rate to a quarter of what it currently is and describing the various changes that the carceral state has caused outside the prison context, such as vast disenfranchisement of minority groups and fluctuations in the political environment).

44. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013, at 1 (2014), <https://www.bjs.gov/content/pub/pdf/p13.pdf> [<https://perma.cc/U8P9-R5FZ>].

45. *Id.* at 2.

46. *Id.*

47. GOTTSCHALK, *supra* note 2, at 20.

48. See generally NAZGOL GHANDNOOSH, SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES (2014); Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949 (2014); J.T. Pickett & T. Chiricos, *Controlling Other People's Children: Racialized Views of Delinquency and Whites' Punitive Attitudes Toward Juvenile Offenders*, 50 CRIMINOLOGY 673, 692 (2012); J.T. Pickett et al., *The Racial Foundations of Whites' Support for Child Saving*, 44 SOC. SCI. RES. 44 (2014).

49. More specifically, Gottschalk contends that the focus on racial disparities in criminal enforcement obscures broad changes in the U.S. political economy associated with the carceral state's entrenchment and with sustained racial subordination of poor people of color. These changes in the U.S. political economy include growing income and other inequalities, an

But Gottschalk is simply mistaken that the racial justice frame uniformly neglects economic and other considerations and that equality-based arguments necessarily fall short as a mobilizing framework. There is no reason why attention to racial violence necessarily obscures political-economic or other important considerations. Nor is a racial justice frame at odds with coalitional efforts that attend to racial injustice in connection with other concerns.

Perhaps Gottschalk is dismissive of the racial justice frame in part because she appears to associate the racial justice frame with the content of Michelle Alexander's *The New Jim Crow*, a book which Gottschalk praises but ultimately regards as flawed.⁵⁰ Yet, the movement for racial justice in criminal law enforcement is by no means limited to the content of Alexander's book. The demands of Black Lives Matter and the Movement for Black Lives, for instance, reach significantly beyond drug-related criminal law enforcement, which is the primary focus of Alexander's analysis.⁵¹ The racial justice critique of U.S. carceral practices is also informed by much important scholarly and activist work beyond Alexander's *The New Jim Crow*.⁵²

Second, Gottschalk argues that the racial justice frame is misguided because there are many people—millions in fact—who are subject to excessive criminalization and brutal punishment in the United States who

escalating political assault on the public sector and organized labor, the economic decline in wide areas of rural and urban America, and deep structural changes in the job market. See GOTTSCHALK, *supra* note 2, at 10–14.

50. Gottschalk repeatedly references Alexander's book as an illustration of projects to advance racial justice in criminal law enforcement. And though Gottschalk celebrates the enormous contribution made by Alexander's book, and the social activism that the book inspired, Gottschalk recognizes the inattention to political economy and the broader scope of the carceral state as significant limitations for the "*New Jim Crow* frame" as a comprehensive analytic or decarceration framework. According to Gottschalk, the "*New Jim Crow* frame" is unable to "sustain the broad political movement necessary to dramatically reduce the number of people in jail and prison or ameliorate the many ways in which the carceral state has deformed U.S. society and political institutions." *Id.* at 3, 5, 13–14. Later in her analysis, Gottschalk acknowledges that Alexander herself may have reconceptualized her own political engagement of criminal law reform to encompass political-economic concerns, but this does not inform Gottschalk's overwhelmingly critical assessment of the prospects of a movement for racial justice in criminal law enforcement to register wider ranging effects. See *id.* at 276 ("Since publishing *The New Jim Crow*, Michelle Alexander has become an outspoken advocate of forging a political movement to challenge the carceral state that is more encompassing than the race-centered approach she appeared to be endorsing in her book."). For an example of Michelle Alexander's more recent public engagement, see Michelle Alexander, *Breaking My Silence*, NATION (Sept. 4, 2013), <http://www.thenation.com/article/breaking-my-silence/> [http://perma.cc/DQ46-9AUM].

51. See *infra* subpart III(B).

52. See generally PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE (2010); COLE, *supra* note 8; ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2011); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2014).

are Latino or white.⁵³ Gottschalk acknowledges that race matters deeply in any effort to dismantle the carceral state, but she points out that “the United States would still have an incarceration crisis even if African-Americans were sent to prison and jail at ‘only’ the rate at which whites in the United States are currently locked up.”⁵⁴ The incarceration rate for white males in the United States is approximately 708 per 100,000—significantly greater than the total incarceration rate of punitive Russia, which is 568 per 100,000, and radically more than the incarceration rates of otherwise-similar states like Canada, which incarcerates 117 per 100,000 of its citizens, or Germany, which incarcerates 85 per 100,000 of its citizens.⁵⁵ By contrast, the incarceration rate for African-Americans was over 2,000 per 100,000 in 2010.⁵⁶ Still, new waves of harsh criminal enforcement against immigration-law violators, methamphetamine drug abusers, and those labeled sex offenders increasingly impact Latinos, immigrants, and low-income whites rather than African-Americans.⁵⁷

But racial justice critics understand that there are countless people affected by hyperpunitive policies who are Latino and white.⁵⁸ Instead, their focus on the racial dimensions of criminal law enforcement underscores the fact that criminal processes in the United States assumed their especially degrading and dehumanizing character through historical practices of racial subordination that have led blackness and criminality to be connected in the American imagination.⁵⁹ These racial dynamics generally inform the American tolerance for penal severity, thoroughly infecting U.S. penal practices and modes of thought about crime and punishment. Racialized ideas about crime and imprisonment influence criminal law’s harshness and violence, in other words, even when criminal suspects and defendants are not African-American.⁶⁰

Recognizing these dynamics spurred by racial inequity should motivate a fundamental reconsideration of the justice of U.S. criminal practices, across the board, or so the racial justice frame avers. The fact

53. GOTTSCHALK, *supra* note 2, at 4–5.

54. *Id.* at 4.

55. *Id.* at 5 fig.1.1.

56. See, e.g., *United States Incarceration Rates by Race and Ethnicity, 2010*, PRISON POL’Y INITIATIVE (2010), <http://www.prisonpolicy.org/graphs/raceinc.html> [<https://perma.cc/S365-J82H>].

57. GOTTSCHALK, *supra* note 2, at 4, 6.

58. See MARC MAUER, THE SENTENCING PROJECT, THE CHANGING DYNAMICS OF WOMEN’S INCARCERATION 6 (2013) (detailing a drastic increase in incarcerations of Latina and white women over the last decade). See generally BUTLER, *supra* note 52; DAVIS, *supra* note 52; MUHAMMAD, *supra* note 52.

59. See MUHAMMAD, *supra* note 52 at 1, 227 (exploring the history of the statistical link between criminality and race and concluding that the way statistics are compiled and interpreted depends heavily on one’s own perspectives).

60. GHANDNOOSH, *supra* note 48, at 33.

that the Black Lives Matter movement has garnered widespread, interracial support speaks to the political possibilities of such equality-based appeals, even if the movement has also met with hostility from other quarters. The results of social-psychological studies suggesting racial disparities increase whites' support for punitive policies do not mean that the racial justice framing of reform should be rejected, but that racial inequity in the criminal process must be exposed in ways that even more starkly call into question the legitimacy of these practices. I will return to these matters in Part III where I consider in more depth movements for racial and social justice in criminal law enforcement.

Gottschalk identifies a second reform frame in the bipartisan efforts to reduce incarceration primarily through drug law and related reform, much of which is motivated by cost-cutting and is now associated perhaps most prominently with the Cut50 coalition. Cut50, an unlikely alliance of progressives and conservatives, has resolved to cut incarceration levels by 50% over ten years, joining in common cause the National Association for the Advancement of Colored People with Newt Gingrich, Grover Norquist, Republican senators and representatives, and the conservative criminal law reform group "Right on Crime."⁶¹

Gottschalk exposes with dazzling force the weaknesses of current bipartisan reform efforts. These efforts often center on reducing the severity of punishment for low-level drug offenses and other nonviolent, nonserious, nonsex crimes—what Gottschalk calls the "non, non, nons."⁶² But sentencing reform along these lines, Gottschalk reveals, will barely make a dent in outsized U.S. prison populations, as the majority of prisoners are not convicted of offenses unambiguously classified as low-level, nonviolent crimes.⁶³ As she puts it, "U.S. prisons are not filled with easily identifiable Jean Valjeans."⁶⁴

Bipartisan efforts also prize drug courts, reentry courts, and a constellation of programs focused on reducing recidivism, reentry, and justice reinvestment (especially for the "non, non, nons")—an array of programs Gottschalk terms the three Rs.⁶⁵ But she shows that these measures too are insufficient to address the enormity of the problems they

61. *Our Mission & Work*, #CUT50, <http://www.cut50.org/mission> [<http://perma.cc/Y8HX-6APW>] ("#cut50 is a national bipartisan initiative to safely and smartly reduce our incarcerated population by 50 percent over the next 10 years.")

62. GOTTSCHALK, *supra* note 2, at 165.

63. *See id.* at 169 (explaining that four out of five state prisoners classified as "nonviolent" have committed "serious" crimes, that many individuals serving time for nonviolent offenses have actually committed violent offenses in the past, and that only a quarter of federal and a fifth of state prisoners are serving time for a first offense).

64. *Id.* (referencing the sympathetic petty thief in *Les Misérables*).

65. *See id.* at 79–80.

purport to confront.⁶⁶ A résumé-writing class, or a drug treatment court, for example, will not ameliorate the chronic unemployment and vulnerability to incarceration of the many mentally ill, addicted people who cycle through U.S. jails and prisons, doing life, as some commentators term it, “on the installment plan.”⁶⁷

One further prominent current in contemporary bipartisan reform places particular emphasis on reducing budget deficits through decarceration and other fiscal policy reform. Gottschalk shows how bipartisan budget-based reform likewise presents an empty promise of change, because state expenditures on corrections amount to only a small, single-digit percentage of total state expenditures, with most prison costs largely fixed and not readily cut.⁶⁸ What is more, many powerful interests profit from mass incarceration—both politically and economically.⁶⁹ Thus, decarceration rooted in mere cost-cutting tends, in Gottschalk’s analysis, to make prisons “leaner and meaner” without enabling other, more transformative change.⁷⁰

Gottschalk regards these various bipartisan reform efforts—the focus on the “non, non, nons,” the RRR programs, and budget-based criminal law reform—as intricately entwined and as similar to racial justice projects in their inability to bring about meaningful change.⁷¹ By conflating these distinct currents of reform, however, she misses the opportunity to fully identify the most concerning aspects of certain of these initiatives and to constructively engage the more promising possibilities of certain other reform projects. It is to these matters that we now turn.

II. Engaging the Limits of Proposed Reform

We might understand contemporary criminal law reform initiatives as actually consisting of two further, distinguishable currents. The first entails decarceration reform motivated principally by cost-cutting, which I am calling “neoliberal penal reform.” The second involves drug law reform, police reform, and related efforts intended to reduce mass incarceration and overcriminalization and, often, to address racial disparities in criminal law enforcement—which I will designate, as a shorthand, “drug law reform,” though these projects frequently incorporate other, broader modifications to

66. *See id.* at 97, 100, 106 (arguing that the focus on reentry, recidivism, and justice reinvestment is misplaced as these policies and programs overlook the deeper, structural socioeconomic and political causes behind the rise of the carceral state).

67. Joan Petersilia & Robert Weisberg, *Parole in California: It's a Crime*, L.A. TIMES (Apr. 23, 2006), <http://articles.latimes.com/2006/apr/23/opinion/op-petersilia23> [<http://perma.cc/P2BE-2SXH>].

68. GOTTSCHALK, *supra* note 2, at 9.

69. *Id.*

70. *Id.*

71. *See id.* at 3, 17.

sentencing laws, police practices, and expansion of mental health, addiction-treatment, and other programs.

Neoliberal penal reform threatens to disguise, while further entrenching, the carceral state. Although neoliberal penal reform may advance the cause of decarceration in some measure, mainly by attracting more adherents to the cause, its underlying values and fiscally regressive orientation are at odds with the social turn in public policy that would be necessary to constitute forms of governance beyond our carceral state.

Proposed reform emphasizing changes to drug law enforcement similarly stands to reduce incarceration and shift other carceral practices only modestly. But, as it is typically coupled with a commitment to more substantially reduce penal severity, these efforts could be developed to more promising ends—to engender a deeper public reconsideration of what would actually be necessary to begin to dismantle our current practices of incarceration and criminalization.

A. *The Perils of Neoliberal Penal Reform*

While Gottschalk regards cost-cutting and drug law reform efforts as equally ineffective, these two reform imperatives differ both in their underlying motivations as well as in their effects. In contrast to cost-cutting reform, drug law reform is often pursued through resource-intensive, state-supported diversionary alternatives for people who would not otherwise face prison sentences. Though in many reform packages both imperatives are present to a greater or lesser degree, drug law reform—typically motivated by humanitarian, racial justice, and public health concerns—ought to be distinguished, at least conceptually, from a program of decarceration that is primarily moved, in Grover Norquist’s terms, to shrink government “down to the size where we can drown it in the bathtub.”⁷²

Insofar as reducing government spending is its primary motivation, decarceration tied to regressive fiscal reform might be recognized as a form of neoliberal governance.⁷³ Neoliberal governance refers generally to a constellation of policies and associated ideas that promote financial and trade deregulation, low taxes, privatization of public services, and minimal welfare assistance in an effort to limit the role of government in addressing social and economic problems.⁷⁴

72. Editorial, *Rethinking Their Pledge*, N.Y. TIMES (Apr. 22, 2011), http://www.nytimes.com/2011/04/22/opinion/22fri1.html?_r=0 [<http://perma.cc/F4YJ-GNDX>].

73. See CHUCK DEVORE, TEX. PUB. POLICY FOUND., *THE TEXAS MODEL: PROSPERITY IN THE LONE STAR STATE AND LESSONS FOR AMERICA*, 119–22 (2012 ed. 2012).

74. David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 1, 2 (“Neoliberalism is an overlapping set of arguments and premises . . . that are united by their tendency to support market imperatives and unequal economic power in the context of political conflicts . . .”); see also GOTTSCHALK, *supra* note 2, at 11 (noting that “[n]eoliberalism has long rested on privatizing failure and denigrating the role of government to

Gottschalk makes an overwhelming case that neoliberal penalty—with its emphasis on slashing criminal law enforcement and penal expenditures—is an ineffective decarceration framework.⁷⁵ These measures should not be expected to significantly reduce incarceration and overcriminalization.

But Gottschalk gives short shrift to the ways in which decarceration paired with regressive fiscal reform threatens to deepen immiseration inside and outside of prisons in ways fundamentally at odds with dismantling the carceral state. Though Gottschalk persuasively demonstrates that it should be possible in principle to substantially reduce incarceration through comprehensive sentencing reform without resolving more fundamental “structural problems,” a criminal law reform program organized around reduced government spending, without other animating social goals, tends toward concealment and displacement of incarceration and the expansion of other trends that reinforce overcriminalization and penal severity.⁷⁶

Consider, for instance, Texas’s often-celebrated decarceration. When a budget projection in 2007 by the Texas Legislative Budget Board indicated Texas would need an additional 17,000 prison beds at a cost of \$2 billion by the end of 2012, the state enacted a series of criminal law reforms to avoid these expenditures.⁷⁷ Promoted by the Texas Public Policy

solve economic and social problems”); HARCOURT, *supra* note 6, at 41 (suggesting that a core idea of neoliberal penalty is that the government’s legitimate role is essentially limited to the punishment arena); Michael Dawson, *3 of 10 Theses on Neoliberalism in the U.S. During the Early 21st Century*, 6 CARCERAL NOTEBOOKS 11, 17 (2010) (recognizing neoliberalism’s “sterile and extremely limited notion of politics”).

75. See GOTTSCHALK, *supra* note 2, at 77–78 (arguing that the neoliberal push to privatize government services led to a massive and expensive expansion of the penal system because private interests became deeply invested in the carceral state).

76. See *id.* at 111, 260.

77. Texas’s reform occurred in several phases. In 2007, with HB 1 and SB 166, the legislature reduced the likelihood that technical violations would result in reincarceration by investing \$241 million to create less costly treatment programs and provide financial incentives to local probation departments to apply alternative sanctions for technical violations. See Tex. H.B. 1, 80th Leg., R.S. (2007) (authorizing 800 new beds for people on probation with substance-abuse needs in a residential program; 3,000 new slots for people on probation in outpatient substance-abuse treatment; 1,400 new beds in intermediate sanction facilities to divert technical probation and parole violators; 300 new beds for people on parole in halfway houses; 500 new beds for people convicted of DWI offenses in an in-prison treatment unit; 1,500 new beds for in-prison substance-abuse treatment programs; 1,200 new slots for substance-abuse treatment programs in the state jail system). Also in 2007, with SB 103, the legislature eliminated prison sentences for juvenile misdemeanors and gave judges more discretion over the imposition of sentences for other juvenile offenses. Tex. S.B. 103, 80th Leg., R.S. (2007). This allowed the state to close three juvenile prisons in 2009, and the state reinvested the savings into juvenile probation and alternative facilities. See generally MARC LEVIN, CTR. FOR EFFECTIVE JUSTICE, ADULT CORRECTION REFORM: LOWER CRIME, LOWER COSTS (2011) (recognizing the savings associated with closing three juvenile lockups and noting that policymakers invested part of the money saved primarily by closing two remote juvenile lockups in juvenile probation). In 2011, with HB 2649 and HB 1205, the Texas legislature expanded earned-credit eligibility for both people incarcerated for committing nonviolent offenses and probationers. See LEVIN, *supra*, at 2. The 2001 scandal

Foundation (TPPF)—a prominent conservative think tank—and Right on Crime—a national organization dedicated to aligning criminal law reform with traditional conservative commitments—the state’s decarceration initiatives have centered on cutting costs, advancing TPPF’s agenda of maintaining “low taxes” and “a light and predictable regulatory burden.”⁷⁸

A bipartisan coalition of Texas lawmakers led by Republican State Representative Jerry Madden and Democratic State Senator John Whitmire set out to avoid the projected \$2 billion expenditure required for prison expansion by committing to spend \$241 million on less costly initiatives designated as “prison diversion” programs.⁷⁹ TPPF has proudly announced that the state implemented its criminal law reform “without lowering the penalties for any offense,” even lengthening some sentences, and by placing less serious “[n]onviolent drug and property offenders . . . under control in a separate system” rather than setting them “free.”⁸⁰

During this same period, Texas also cut taxes and reduced social spending in other areas—primarily education and other public services. Governor Rick Perry promoted a significant reduction in property taxes in 2006. When Texas faced a \$27 billion budget deficit for fiscal years 2012 and 2013, Perry sought the aid of Grover Norquist, who toured the state with the governor urging legislators to resist implementing any new taxes.⁸¹ Heeding that urging, legislators ensured that the state’s biennial budget for 2012 and 2013 reflected substantial cuts in state spending for education and social services, and the legislature again declined to increase taxes.⁸²

in Tulia, Texas, where dozens of African-Americans were charged and convicted of false, low-level cocaine offenses based on uncorroborated testimony and sentenced to 20, 40, and even up to 90 years, had earlier prompted significant pressure for criminal law reform in Texas. In the wake of the Tulia scandal, Governor Rick Perry pardoned the Tulia defendants, and the Texas legislature passed bills requiring corroboration of confidential informants’ testimony, prohibiting racial profiling by police officers, and providing for public legal defense for indigent defendants. But the Tulia scandal did not generate as much momentum for decarceration reform as the later budget projection. Scott Gold, *35 Are Pardoned in Texas Drug Case*, L.A. TIMES (Aug. 23, 2003), <http://articles.latimes.com/2003/aug/23/nation/na-tulia23> [<http://perma.cc/PW3G-7W6G>]; see also Tex. H.B. 2351, 77th Leg., R.S. (2001) (requiring corroboration of testimony from confidential informants); Tex. S.B. 1074, 77th Leg., R.S. (2001) (prohibiting racial profiling by peace officers).

78. DEVORE, *supra* note 73, at 4, 54, 119–26.

79. Tierney Sneed, *What Texas is Teaching the Country About Mass Incarceration*, U.S. NEWS & WORLD REP. (Nov. 19, 2014), <http://www.usnews.com/news/articles/2014/11/19/texas-georgia-mississippi-set-conservative-example-for-criminal-justice-reform> [<http://perma.cc/JX3Q-6XMJ>] (noting that Texas has the fourth-highest adult incarceration rate in the country).

80. DEVORE, *supra* note 73, at 122.

81. GOTTSCHALK, *supra* note 2, at 112.

82. *Id.*; see also Ross Ramsey et al., *Texas Legislature Passes \$15 Billion in Cuts*, TEX. TRIB. (May 28, 2011), <http://www.texastribune.org/2011/05/28/liveblog-texas-legislature-passes-15-billion/> [<http://perma.cc/J5K8-HGZQ>] (noting that the biggest cuts were in education and health and human services); Paul J. Weber, *Texas School Budget Cuts, Teacher Layoffs Add to Unemployment*, HUFFINGTON POST (Sept. 29, 2011, 9:42 AM), http://www.huffingtonpost.com/2011/09/29/shrinking-texas-school-pa_0_n_986909.html

Although Texas reports that its criminal law reforms have resulted in a 10% drop in the state's prison population during a period when the state's crime rate declined by 18%, as Gottschalk suggests, the size of the overall decline is itself the subject of controversy.⁸³ The federal Bureau of Justice Statistics indicates the state prison population declined by only 3.5%.⁸⁴ The state and federal figures diverge because Texas does not include in its prison counts the thousands of state prisoners held in lockdown facilities designated as prison alternatives, nor does it include those persons incarcerated in county jails, or even those confined in prison but designated in "pre-release" status.⁸⁵

Indeed, in the aftermath of the 2007 reform, Texas allocated millions of dollars to creating less costly, fully secured facilities for people with drug offenses or who violate the conditions of probation or parole. Though these facilities look and operate like prisons, with terms of lockdown confinement typically ranging between two to six months for probation or parole violators, people detained in these facilities are not included in the state's prison population totals.⁸⁶ Whereas aggregate incarceration levels may have modestly decreased in Texas, accurate counting of incarcerated populations has been undermined as the designation of incarceration in certain "intermediate sanction facilities," "Substance Abuse Felony Punishment Facilities," and a range of other privately contracted detention

[<http://perma.cc/Q6MW-N992>] (observing that while "[t]he Legislature cut public education by about \$537 per student over the next two years," Governor Perry and Republican leaders refused to raise taxes or dip into the "rainy day fund").

83. In 2007, Texas reported an incarcerated population of 226,901, one of the largest incarcerated populations in the United States. Texas's budget for prison, jail, parole, and probation programs amounted to nearly \$3 billion annually. See PEW CTR. ON THE STATES, PUB. SAFETY PERFORMANCE PROJECT, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 41–42 (2009) (reporting that Texas's state jail and prison populations totaled to 226,901 in 2007 and that Texas spent \$2.958 billion on corrections in fiscal year 2008). From 2007 to 2009, the state reported that its prison population stabilized instead of increasing, as more people were diverted from prison to probation and intermediate sanction facilities. See Keith B. Richburg, *States Seek Less Costly Substitutes for Prison*, WASH. POST (July 13, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/12/AR2009071202432_2.html [<http://perma.cc/7MXW-4ZDS>] (stating that, from January 2007 until December 2008, Texas added 529 inmates, which was only a tenth of what was projected). In 2009, direct sentences to prison reportedly decreased 6%. *State Initiatives: Texas*, RIGHT ON CRIME, TEX. PUB. POL'Y FOUND., <http://rightoncrime.com/category/state-initiatives/texas/> [<http://perma.cc/6YPM-XYUS>]. Between 2009 and 2014, Texas's imprisonment rate declined by 10% while crime dropped by 18%. Sneed, *supra* note 79. But see GOTTSCHALK, *supra* note 2, at 108–09 (recognizing the disparity between the federal and state figures).

84. GOTTSCHALK, *supra* note 2, at 108–09.

85. See *id.* at 109 (explaining that Texas does not count the state inmates held in county jails or those confined to "fully secured substance abuse treatment facilities" and "intermediate sanction facilities").

86. *Id.*

settings may fall outside state prison population statistics.⁸⁷ Figures on jail populations are likewise difficult to come by because numbers are generally recorded separately in each county, with considerable fluctuations over time due to many short stays and without reliable aggregate accounting.⁸⁸

“The dirty little secret” about Texas’s decarceration reform, according to Representative Madden, “is we built about 4,000 beds, but we made them short-term substance-abuse facilities and after-care in communities.” As Senator Whitmire explained: “Those are lockup facilities. They’ve got razor wire If you want to call them prisons for political cover, fine.”⁸⁹ Along these lines, neoliberal penal reform tends to disguise cost-cutting initiatives as decarceration, when in fact these measures largely preserve the status quo at reduced expense.

Gottschalk reveals that when deficit reduction drives decarceration initiatives, the result is generally an expansion in the fines and fees imposed on defendants, on the one hand, and cuts in essential prison expenditures like health services and food, on the other.⁹⁰ Prisons and jails, as Gottschalk underscores, become “leaner and meaner.”⁹¹ For example, in the face of an epidemic of prison rape, Texas Governor Rick Perry wrote a letter in 2014 to the Department of Justice announcing that Texas would not assume the expense for making required modifications to comply with the Prison Rape Elimination Act.⁹² Texas does not provide air conditioning even in the hottest months in many of its prisons.⁹³ And when the prison guards’ union joined in support of a prisoners’ lawsuit challenging the excessive heat in Texas prisons—after learning the state planned to construct climate-controlled barns to raise pigs for prisoners’ consumption—Democratic Senator Whitmire, sponsor of Texas’s criminal law reform, responded that “the people of Texas don’t want air-conditioned prisons, and there’s a lot of other things on my list above the heat.”⁹⁴ In 2011, the Texas legislature considered a bill that would establish tent cities

87. *Id.*; see also *Private Facility Contract Monitoring/Oversight Division*, TEX. DEP’T CRIM. JUST., <https://www.tdcj.state.tx.us/divisions/pf/index.html> [http://perma.cc/K55U-4V27] (providing an overview of the Private Facility Contract Monitoring/Oversight Division).

88. See *Private Facility Contract Monitoring/Oversight Division*, *supra* note 98.

89. Donald Gilliland, *Prison System 6: An Unlikely Duo Break the Cycle in Texas*, PENN LIVE (Mar. 3, 2011), http://www.pennlive.com/specialprojects/index.ssf/2011/03/in_texas_an_unlikely_duo_break.html [http://perma.cc/A8QV-JFNH].

90. GOTTSCHALK, *supra* note 2, at 9.

91. See *supra* note 82 and accompanying text.

92. *Id.* at 137.

93. See *id.* at 136 (noting that “less than one-fifth of the state’s prisons [are] fully air-conditioned”).

94. *Id.*; see also Ann Zimmerman, *Extreme Heat Tests Prisons*, WALL STREET J. (Oct. 17, 2013), <http://www.wsj.com/articles/SB10001424052702304441404579123381202026834> [http://perma.cc/27WJ-KESR]; Editorial, *Failure to Communicate*, HOUS. CHRON. (Apr. 25, 2014), <http://www.chron.com/opinion/editorials/article/Failure-to-communicate-5430794.php> [http://perma.cc/9HPM-H2ZL].

to house inmates as a cost-saving measure.⁹⁵ Pressures to reduce spending also encourage increased reliance on privatization of imprisonment and operational and other savings through the use of prison labor.⁹⁶ Gottschalk thoroughly persuades that budget deficits will not enable substantial decarceration without a concomitant shift in penal philosophy and sentencing law and policy.⁹⁷

But a regressive fiscal agenda is not merely ineffective as a decarceration framework; it is at odds with dismantling the carceral state. Although Gottschalk lays bare the weaknesses of neoliberal penal reform, the masking and displacement these developments evidence should be understood as a product of the emphasis on regressive fiscal reform, rather than merely reflecting the limits of this approach to achieve reductions in penal severity.⁹⁸ More specifically, anti-tax initiatives and cuts to government spending threaten to further embed carceral practices, especially beyond jail and prison walls, entrenching punitive policies. To respond to mental illness, addiction, poverty, and other root causes will require governments to allocate additional resources to those ends. Neoliberal penal reform, however, is typically accompanied by a lack of funding for mental health and other diversionary programs that might otherwise provide the requisite diversionary services to facilitate meaningful decarceration. Accordingly, even as Texas has established mental health and other diversion programs, they are unable to operate as intended. At one Right on Crime convening, Andrew Keller, a director of a mental health diversion policy institute in Harris County, Texas, reported a lack of adequate resources, mental health benefits, and Medicaid funds for the programs he oversees, noting that programs are unable to recruit providers because “[t]hey aren’t going to be paid very much, and then they see the paper work and they just won’t agree to it.”⁹⁹ Keller reports that the state fails to cover treatment for PTSD and anxiety disorder outside prison or jail even though these conditions frequently afflict individuals who are

95. GOTTSCHALK, *supra* note 2, at 40.

96. *See id.* at 40, 49 (noting increased pressure to cut expenditures in prisons and discussing the political narrative driving alternative prison-funding mechanisms).

97. *See id.* at 25 (“[M]ounting budgetary and fiscal pressures will not be enough on their own to spur cities, counties, states, and the federal government to make deep and lasting cuts in their incarceration rates and to address the far-reaching political, social and economic consequences of the carceral state.”).

98. *See id.* at 9 (noting that, “[f]aced with powerful interests that profit politically and economically from mass imprisonment, states . . . have been making largely symbolic cuts that do not significantly reduce the incarcerated population or save much money”).

99. *See* RIGHT ON CRIME, PRE-TRIAL AND MENTAL HEALTH POLICY IN HARRIS COUNTY, TEXAS: FRONT-END REFORMS THAT PROTECT CITIZENS, CONTROL COSTS, AND ENSURE JUSTICE 49 (2015) (quoting Andrew Keller).

subject to minor criminal sentences and could otherwise be diverted from jail or prison.¹⁰⁰

Gottschalk does recognize that Texas's anti-tax and deregulatory measures defund or underfund the very sort of social projects—high-quality schools, living-wage jobs, public health care, mental health care, affordable housing, and social services—that are most likely to improve the quality of life for people in areas substantially impacted by crime and incarceration.¹⁰¹ But she stops short of identifying neoliberal penal reform as itself a fundamental obstacle to meaningful decarceration.

These dynamics are powerfully illustrated by the criminalization of student misconduct in Texas public schools at the same time that funding to education has been cut. With limited means to engage youth and maintain an environment conducive to learning in under-resourced public schools, Texas has increasingly come to rely on school police officers to respond to youthful misbehavior.¹⁰² Tickets commonly issued to students by school police have included tickets for disruption of class and disorderly conduct.¹⁰³ Many school districts contract with local law enforcement agencies to assign one or more police officers to the district.¹⁰⁴ Other schools have commissioned their own police forces—roughly 167 Texas school districts, encompassing half of the state's students, use a school-commissioned police force model.¹⁰⁵ Economically disadvantaged schools with a majority of racial-minority students are more likely to employ police officers in schools, and hence, misbehaving students in these schools are more likely to suffer criminal consequences for their misbehavior.¹⁰⁶ In 2015, Texas eliminated criminal penalties for truancy after a state-level study uncovered 115,000 criminal truancy cases filed in 2013 alone.¹⁰⁷ Juvenile incarceration has also been reduced.¹⁰⁸ But schools persist in

100. *See id.* (quoting Ryan Sullivan, Policy Advisor, Harris County Sheriff's Office).

101. *See* GOTTSCHALK, *supra* note 2, at 261 (asserting that decarceration will require significant social projects and will cost money).

102. Class C misdemeanors include disruption of class, disruption of transportation, and gang membership. Tex. Educ. Code Ann. §§ 37.121, 37.124, 37.126 (West 2012).

103. TEX. APPLESEED, TEXAS' SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST, AND USE OF FORCE IN PUBLIC SCHOOLS 5 (2010).

104. *Id.* at 38.

105. *Id.* at 43.

106. *See* Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009) (discussing research on school police officers and anticipating that conflicts will more frequently be resolved by arrests in schools with officers).

107. Terri Langford, *Schools, Courts Worry About New Truancy Law*, TEX. TRIB. (July 12, 2015), <http://www.texastribune.org/2015/07/12/schools-courts-worry-about-truancy-law/> [<http://perma.cc/4HDY-A96L>].

108. TONY FABELO ET AL., THE COUNCIL OF STATE GOV'TS JUSTICE CTR., CLOSER TO HOME: AN ANALYSIS OF THE STATE AND LOCAL IMPACT OF THE TEXAS JUVENILE JUSTICE REFORMS 1 (2015).

pursuing criminal charges against schoolchildren—especially for misbehavior in class, swearing, and disturbing the peace.¹⁰⁹

Moreover, according to the Appleseed study,

[f]our in five children sent to court for truancy were found to be economically disadvantaged, meaning they are eligible for free and reduced lunch, and are least able to afford steep fines typically levied in response to truancy charges. Failure to pay fines, which can run as high as \$500, can result in an arrest warrant and even incarceration.¹¹⁰

Once a child turned eighteen, the study described, if the ticket-related fines had not been paid, the young person faced a warrant and jail time.¹¹¹ A lawsuit filed by the ACLU of Texas has cited the jailing of hundreds of teenagers for unpaid tickets issued years before.¹¹² Even after truancy was eliminated as a ground for criminal conviction of young people, for other in-school misbehavior—a fight in which students pour milk on each other, for instance—students may find themselves in criminal court, facing substantial fines, criminal records, and ultimately incarceration.¹¹³ In these ways, cuts to school funding in an atmosphere of existing reliance on policing to ensure school discipline further embeds the criminalization of low-income youth of color and reinforces the school-to-prison pipeline.

Regressive fiscal and antiregulatory commitments associated with Texas's cost-cutting reforms also interfere with meaningful decarceration in other respects, exacerbating the criminalization of poverty. The case of debt-related incarceration serves as a notable example. As Gottschalk explores, when criminal law reform is organized around an effort to reduce state expenditures, pressures increase to charge defendants and convicted persons fines and fees to subsidize the costs of the criminal process.¹¹⁴ But

109. Therese Edmiston, Note, *Classroom to Courtroom: How Texas's Unique School-Based Ticketing Practice Turns Students into Criminals, Burdens Courts, and Violates the Eighth Amendment*, 17 TEX. J. C.L. & C.R. 181, 192–93 (2012); Press Release, Texas Appleseed, New Report Finds Inconsistent and Unfair Texas Truancy Policies Disproportionately Hurt Low-Income Kids and Students of Color (Mar. 5, 2015), <https://www.texasappleseed.org/sites/default/files/ForWeb2015TruancyReportRelease-FINAL-March5.pdf> [<http://perma.cc/G5Y6-ZUB2>].

110. Press Release, Texas Appleseed, *supra* note 121.

111. Edmiston, *supra* note 109, at 191–92.

112. *De Luna v. Hidalgo Cty.*, 853 F. Supp. 2d 623, 626 (S.D. Tex. 2012); Edmiston, *supra* note 109, at 192.

113. Edmiston, *supra* note 109, at 182, 192; Donna St. George, *In Texas Schools, Response to Misbehavior Is Questioned*, WASH. POST (Aug. 21, 2011), https://www.washingtonpost.com/local/education/in-texas-schools-a-criminal-response-to-misbehavior/2011/08/04/gIQA5EG9UJ_story.html [<http://perma.cc/BNR6-N7XW>]; Brian Thevenot, *School District Cops Ticket Thousands of Students*, TEX. TRIB. (June 2, 2010), <http://www.texastribune.org/2010/06/02/school-district-cops-ticket-thousands-of-students/> [<http://perma.cc/KCC6-XPG6>].

114. See GOTTSCHALK, *supra* note 2, at 36 (explaining that, as state funding has declined and legislators pushed to slash budgets, state courts and correctional departments have begun collecting fees and fines from defendants).

beyond criminal legal debt, a regressive fiscal and antiregulatory agenda exacerbates other dimensions of the criminalization of poverty. For instance, payday lenders—who profit on the economic precarity of low-income people who require small, short-term loans to cover basic expenses—thrive in an environment where there is a minimal social safety net for those in desperate economic straits and a meager regulatory apparatus to constrain collections practices. Texas payday loan businesses have routinely engaged in the unlawful use of criminal charges to collect debts in violation of state laws governing the operations of credit-access businesses and the filing of such criminal charges, as well as state and federal fair debt collection laws.¹¹⁵ Over 1,500 criminal complaints of bad check and theft by check were filed by thirteen payday lenders between January 2012 and 2014 in Texas—sometimes resulting in jailing of debtors.¹¹⁶ In one bad-check case, the court ordered payment of \$918.91 for a defaulted \$225 payday loan.¹¹⁷ In another case, in November 2012, Cristina McHan defaulted on a \$200 loan from Cash Biz outside Houston; she was arrested, pled guilty, and was assessed a further \$305 in court costs and fines.¹¹⁸ McHan ultimately “paid off” the debt in part by serving a night in jail.¹¹⁹

Although the Texas Finance Code explicitly prohibits payday loan businesses from pursuing criminal charges related to check authorization,¹²⁰ and although the Texas Penal Code does not criminalize (as theft or fraud) the conveyance of checks to payday lenders that later bounce,¹²¹ when some

115. Forrest Wilder, *Fast Cash: How Taking Out a Payday Loan Could Land You in Jail*, TEX. OBSERVER (July 16, 2013), <http://www.texasobserver.org/cash-fast-how-taking-out-a-payday-loan-could-land-you-in-jail/> [<http://perma.cc/FBV6-AVVD>]; Letter from Texas Appleseed to Consumer Finance Protection Bureau, Federal Trade Commission, Office of the Attorney General, and Office of Consumer Credit of Texas (Dec. 17, 2014) [hereinafter Letter to CFPB], <https://www.texasappleseed.org/sites/default/files/Complaint-CriminalCharges-PaydayBusinesses-Final2014.pdf> [<http://perma.cc/NVD3-3LME>].

116. Melanie Hicken, *In Texas, Payday Lenders Are Getting Borrowers Arrested*, CNN MONEY (Jan. 8, 2015, 7:05 PM), <http://money.cnn.com/2015/01/08/pf/payday-lenders-texas/> [<http://perma.cc/CH2E-2C6V>].

117. Letter to CFPB, *supra* note 115.

118. Wilder, *supra* note 115.

119. *Id.*

120. TEX. FIN. CODE ANN. § 393.201(c)(3). The Republic of Texas Constitution drafted in 1836 plainly states as well that “[n]o person shall be imprisoned for debt in consequence of inability to pay” and the current Texas Constitution’s Bill of Rights provides that “[n]o person shall ever be imprisoned for debt.” REPUB. TEX. CONST. OF 1836, Declaration of Rights, Twelfth, reprinted in 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1069, 1083 (1898); TEX. CONST. art. I, § 18.

121. See TEX. PENAL CODE ANN. §§ 31.04, 31.06, 32.41 (West 2011) (maintaining an exception: that a check was postdated at issuance is a defense to prosecution for theft of service and defeats the general presumption of knowledge or intent applied to bad checks for purposes of prosecution for theft or fraud). Payday loan businesses typically offer short-term loans to borrowers who offer a postdated personal check or authorize electronic debits from their bank account for a finance charge and the borrowed amount. Leah A. Plunkett & Ana Lucía Hurtado,

borrowers have failed to pay off or refinance their payday loans by paying a new finance charge, payday lenders have threatened borrowers with criminal cases, filing complaints with county attorneys, district attorneys, or the courts.¹²² In some instances, this has occurred even after the borrower has paid refinance fees that amount to more than the original borrowed amount.¹²³ The threat of criminal charges and imprisonment serves as a powerful debt-collection tactic as it intimidates borrowers to pay even when they are barely able to do so and when paying may imperil the basic health and well-being of themselves and their families.¹²⁴ Prosecutors and judges have participated in this intimidation by pursuing charges on these criminal complaints, mailing demand letters, and incarcerating debtors, either unaware of or undeterred by the illegality of these practices under Texas law.¹²⁵ Many of these criminal cases were filed after Texas enacted a law in 2012 further specifying that payday lenders are not authorized to pursue criminal charges for nonpayment unless there is clear evidence of fraud.¹²⁶

Federal regulatory oversight may correct some of these abuses, but the Texas regulatory body tasked with enforcing the law as it applies to payday lenders—the Texas Office of the Credit Consumer Commissioner—has already warned payday lenders to cease filing criminal charges against customers. The Commission reports that it simply lacks the resources to

Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help, 44 SUFFOLK U. L. REV. 31, 33–34 (2011). After the loan term expires, generally within a matter of weeks, on the borrower's next payday, the loan is to be repaid by the borrower either by allowing the check to be deposited by the payday loan business or by allowing the business to debit the designated account; alternatively, the borrower may pay a new finance charge to roll over the debt for another pay period. *Id.* at 34.

122. Letter to CFPB, *supra* note 115.

123. *Id.*

124. See Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 86–87 (2002) (noting that most people “will find a way” to repay a loan when threatened with criminal prosecution and jail time).

125. See Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenges to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. REV. 589, 610 (2000) (noting that payday lenders filed over 13,000 criminal charges with law enforcement officials against borrowers in one year in a single Dallas precinct); Wilder, *supra* note 120 (relating one instance in which the Bexar County District Attorney's office not only sent a demand letter on behalf of a payday lender, but also included a demand for “district attorney fees”). In one court, from which more detailed data is available, arrest warrants were issued in 42% of cases brought on the basis of payday loan business complaints. Letter to CFPB, *supra* note 115. In the county with the highest number of documented complaints—more than 700—there was a 28% collection rate, resulting in a recovery of \$131,836 from 204 persons. *Id.*

126. See Letter to CFPB, *supra* note 115 (explaining new findings based exclusively on complaints and cases filed after Texas Finance Code § 393.201(c)(3) went into effect). Thousands of similar cases have been identified over a period of roughly fifteen years. See RUTH CARDELLA ET AL., CONSUMERS UNION, WOLF IN SHEEP'S CLOTHING: PAYDAY LOANS DISGUISE ILLEGAL LENDING (1999); Drysdale & Keest, *supra* note 124, at 610.

address the problem and has no jurisdiction over prosecutors or judges.¹²⁷ Though in some cases federal regulatory actors might offer support, if they do not, the Texas Commission has only thirty field examiners to undertake its work, and those thirty examiners are tasked with regulating 15,000 businesses, including 3,500 payday and title loan businesses.¹²⁸ As the director of consumer protection explained: “Although I’d love to take a bunch of folks and go at that one issue . . . I don’t have that luxury.”¹²⁹ According to the director, his field examiners are able to find violations only when consumers complain—a rare occurrence, particularly if a person with limited resources and legal literacy is facing criminal charges—or there is a spot inspection of a particular business that happens to reveal during the on-site inspection improper use of criminal complaints to collect debts.¹³⁰

The reasons these problems persist, then, are several. First, Texas has relied heavily on criminal enforcement measures as a vehicle for maintaining social order and enforcing obligations in the absence of other social investment to promote public welfare and social cohesion.¹³¹ Relatedly, individuals living in economically precarious circumstances with a depleted social safety net may have few alternative avenues to address their hardship.¹³² An anti-tax, antiregulatory reform agenda is in these respects not simply ineffective as an approach to reducing incarceration; it reinforces hypercriminalization, masks the actual extent of the uses of imprisonment, and impoverishes those public resources that would be crucial as a practical matter to meaningfully dismantle the carceral state even if in principle underlying structural problems are independent of the excessive punitiveness wrought by sentencing law and policy. As the next subpart will explore, neoliberal penal reform poses risks distinct from the relative impotence of drug law reform.

B. *The Limits of Drug Law Reform*

A separate current of contemporary criminal law reform focuses on drug law reform, diversionary sentencing, policing reform, reentry programming, restorative justice, and other sentencing modifications for

127. See Wilder, *supra* note 115.

128. *Id.*

129. *Id.*

130. *Id.*

131. See ELLIOT CURRIE, CRIME AND PUNISHMENT IN AMERICA 17 (1998) (positing that greater imprisonment means a greater reliance on the penal system to maintain social order); ELIZABETH MCNICHOL & NICHOLAS JOHNSON, CTR. ON BUDGET & POLICY PRIORITIES, THE TEXAS ECONOMIC MODEL: HARD FOR OTHER STATES TO FOLLOW AND NOT ALL IT SEEMS 8–9 (2012) (reporting that Texas offers few public services to its residents and has high levels of poverty and low-wage jobs).

132. Johnson, *supra* note 124, at 11–12.

minor offenses. Although these programs promise to bring limited change to the scale of incarceration, they offer a useful starting point for engaging the widespread public commitment to decarcerate. This becomes possible, though, only with a clear-eyed account of the inadequacy of current drug law and related reform.

As Gottschalk persuasively explains, it is implausible that drug law reform and other related minor-offense reforms—on their own—will meaningfully transform U.S. carceral practices.¹³³ Just as President Obama’s federal prison-sentence commutations addressed only a small number of those convicted of drug offenses, proposed drug law reform on its own terms will do little to reduce the monstrous scope and severity of U.S. criminal law enforcement.¹³⁴ At the state level, the entire population convicted of all drug offenses constitutes only roughly 17% of those in state prisons, and many of these people may have some criminal history that involves other categories of offenses.¹³⁵ At the federal level, drug law reform could in principle facilitate somewhat more significant change, because roughly 50% of the federal prison population is incarcerated on drug-related charges.¹³⁶ But the federal prison population is only 11% of the total incarcerated population in the United States, and likewise many people convicted of federal drug offenses are also convicted of other non-drug-related offenses or of more serious drug trafficking crimes.¹³⁷ What these facts reveal is that there is no immediate politically palatable legislative fix to mass incarceration through drug law reform, even at the federal level. Accordingly, Gottschalk and other commentators lament that sentencing reform for drug-related and other offenses has generated, at best, modest results—and projections based on the content of proposed legislation indicate only very minor modifications to the status quo in the future.

But this account fails to recognize the complicated reverberations and effects that might be generated by current drug law and related reform initiatives. Quite apart from the specifics of proposed drug law reform legislation, what the emergence of the Black Lives Matter movement and even the Cut50 coalition plainly mark is an opportunity to reorient public discourse surrounding crime, punishment, and the role of the state. The

133. GOTTSCHALK, *supra* note 2, at 5–6; John Pfaff, *Escaping From the Standard Story: Why the Conventional Wisdom on Prison Growth is Wrong, and Where We Can Go from Here*, 26 FED. SENT’G REP. 265, 265–66 (2014) (explaining that drug law reform is inadequate to reduce the scale of incarceration in the United States because less than half of the increase in incarceration since 1990 is due to drug-related offenses).

134. See Pfaff, *supra* note 15, at 176 (noting that people serving time for drug offenses “make up a relatively small share of the prison population”).

135. *Id.*; see GOTTSCHALK, *supra* note 2, at 5.

136. Pfaff, *supra* note 14, at 180 n.12.

137. *Id.*

confluence of the limits of drug law and related reform and a professed commitment to substantially reduce carceral severity at least present an occasion to confront directly and openly the fact that changing course with respect to U.S. carceral practices will not come to pass unless we devote ourselves to much broader and deeper reform.

Moreover, there is at least some basis to believe that shifts in public opinion could shape criminal law enforcement practices, particularly at the local and state level, even without legislative change. New York's substantial decarceration provides one example. Remarkably, New York has reduced its prison population by 25% since its peak in 1999, closing sixteen jail and prison facilities, during a period when many other states' prison populations increased.¹³⁸ Interestingly, though, New York's prison population began to fall significantly before drug law reform came into effect, that is, before the state largely repealed its punitive Rockefeller Drug Laws in 2009.¹³⁹ Felony drug arrests dropped after the publication of a widely publicized poll indicating public disapproval of mandatory-minimum felony drug sentences.¹⁴⁰ According to several studies of these developments, the changes in New York may have been prompted by widely expressed changes in public opinion at the state and local levels that influenced local law enforcement and prosecutorial behavior, particularly in New York City.¹⁴¹ This indicates that vocal, critical public response to prosecutorial and sentencing behavior in particular jurisdictions may shift sentencing practices even without (or prior to) legislative change.

And the ground for a broader public reappraisal of sentencing policy and proposed reform has already been laid well beyond New York City, as public policy organizations, scholars, and other commentators, including Gottschalk herself, point out that currently proposed reform will not

138. *SI's Arthur Kill Correctional Facility Closed, Six Others Shuttered*, N.Y. POST (Jan. 3, 2012, 2:26 PM), <http://nypost.com/2012/01/03/sis-arthur-kill-correctional-facility-closed-six-others-shuttered/> [<http://perma.cc/ML7K-2BZD>]; *Governor Cuomo Announces Closure of Seven State Prison Facilities*, N.Y. STATE (June 30, 2011), <https://www.governor.ny.gov/news/governor-cuomo-announces-closure-seven-state-prison-facilities> [<http://perma.cc/YX6P-PF4G>]; see also MARC MAUER, SENTENCING PROJECT, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES 1 (2014). New York has cut its entire incarcerated population by approximately 15,000 people since 2005. N.Y. COMM'N OF CORRECTION, INMATE POPULATION STATISTICS (2005–2015) (providing inmate population statistics for state prisons and county jails). On their current terms, drug law reform measures at the state level will be unable to achieve further marked reductions in the scale of incarceration given the relatively small proportion of individuals incarcerated in state prison for drug offenses. Pfaff, *supra* note 14, at 176.

139. See JAMES AUSTIN & MICHAEL JACOBSON, BRENNAN CTR. FOR JUSTICE, HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE? 6 (2013) (indicating that the New York State prison population began to decline in 1992 and declined by 17% between 2000 and 2009).

140. MAUER, *supra* note 150, at 6.

141. AUSTIN & JACOBSON, *supra* note 139, at 6; Pfaff, *supra* note 14, at 216.

substantially reduce incarceration.¹⁴² For example, various web-based “prison population forecasters” allow citizens to determine what reforms might feasibly reduce incarceration levels.¹⁴³ These widely available web applications allow anyone with access to a computer the opportunity to test themselves for how they might approach reducing mass incarceration. One such web tool, created by the Marshall Project, allows users to consider how they might work to realize the Cut50 goal, seeking to reduce the U.S. state prison population by 50%.¹⁴⁴ Users quickly recognize the inadequacy of drug law reform as the exclusive mechanism of decarceration as the tool reflects that the effect of eliminating entirely all state prison sentences for drug offenses and releasing all people sentenced to state prisons for drugs would generate a reduction in state prison populations of only 16%, leaving U.S. state prisons at 84% of current occupancy.¹⁴⁵

One conclusion that could be drawn from this is that little can be done to fundamentally change U.S. carceral practices—and indeed this is the conclusion some scholars and commentators, including Gottschalk, draw.¹⁴⁶ But these circumstances might also provide a public occasion for imagining more meaningful alternatives to our carceral state. Beyond drug law reform, how might we approach the project of decarceration? What responses other than incarceration might address other types of crime beyond drug offenses? To what extent is the U.S. prison boom responsible for maintaining public safety and security? What causes violent crime, and what, other than current sentencing policies, might serve to prevent interpersonal violence?

This gesture toward other possibilities in public discourse and perhaps even in the legislative arena is not merely an effort to generate a less

142. See, e.g., Marc Mauer & David Cole, *How to Lock Up Fewer People*, N.Y. TIMES (May 23, 2015), <http://www.nytimes.com/2015/05/24/opinion/sunday/how-to-lock-up-fewer-people.html> [<http://perma.cc/S8YM-WHDP>] (“Even if we released everyone imprisoned for drugs tomorrow, the United States would still have 1.7 million people behind bars, and an incarceration rate four times that of many Western European nations. Mass incarceration can be ended. But that won’t happen unless we confront the true scale of the problem.”).

143. See, e.g., Ryan King et al., *Prison Population Forecaster*, URBAN INSTITUTE (Aug. 2015), <http://webapp.urban.org/reducing-mass-incarceration/> [<http://perma.cc/7NYT-GXJ9>].

144. See Dana Goldstein, *How to Cut the Prison Population by 50 Percent—No, Freeing Pot Heads and Shoplifters Is Not Enough*, MARSHALL PROJECT (Mar. 4, 2015), <https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent> [<https://perma.cc/AK9S-XAHM>] (providing an interactive tool that allows users to change the percentage of persons imprisoned for specific crimes with the goal of reducing the total state prison population by 50%).

145. *Id.* It should be noted that current drug law reform legislation does not reduce or eliminate drug sentences by anywhere near this magnitude, as many persons classified as drug offenders would not be included in reform efforts that center predominantly on the non, non, nons. See *supra* note 68 and accompanying text.

146. See, e.g., Pfaff, *supra* note 14, at 178–79 (expressing doubt about the ability of legislatures to do anything that will dramatically affect the growth rates of the prison population in the U.S.).

dispiriting account of our possible futures, but to take seriously the potential of rejuvenated public engagement at the local level with questions of enormous common concern while recognizing both the plurality and contingency of political and legal discourse. The aim of such efforts might be to respond to the circumstances at hand opportunistically without foregoing a further reaching, more ambitious political vision. As social theorist Michel De Certeau reminds us, even in circumstances of relative hopelessness, individuals retain their capacity to turn the context at hand to their own independent purposes.¹⁴⁷ De Certeau seeks to reorient our political engagement from large-scale revolutionary or top-down models of political change to a more situational practice that he refers to as “tactical” politics.¹⁴⁸ He writes of the individual’s capacity to make unanticipated use of the circumstances at hand: “Without leaving the place where he has no choice but to live and which lays down its law for him, he establishes within it a degree of *plurality* and creativity . . . draw[ing] unexpected results from his situation.”¹⁴⁹ Tactics are weapons of the relatively weak, strategic deployments of fleeting opportunities to advance otherwise unattainable ends: “there are countless ways of ‘making do’”—and De Certeau understands the use of tactics ultimately as an art of “making do.”¹⁵⁰ Particularly in this moment of a growing commitment in many quarters to decarcerate, rather than resign ourselves to the limitations of the present, we should remain alert to opportunities to tactically engage the gap between expressed desires for change and the inadequacy of current proposals.

Further, to limit political possibilities to the projected results of particular pieces of proposed or enacted legislation offers an unduly static conception of politics and of law. Instead, we might recognize how criminal law enforcement practices may be shaped by public engagement, even absent or prior to legislative change—as the New York case illustrates—and how the inadequacy of existing drug law reform initiatives might be understood as an opening to confront entrenched interests toward more transformative ends.

The remainder of this Part will begin to stage in brief what such a public reconsideration of criminal law reform might address, engaging again with the work of Gottschalk and others. One of the obstacles to more humane criminal policy in the United States has been the relative marginalization of impacted communities, concerned nongovernmental

147. MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* 30 (Steven Rendall trans., 1984).

148. *Id.* at 37.

149. *Id.* at 30. As De Certeau explains, “a tactic boldly juxtaposes diverse elements in order suddenly to produce a flash shedding a different light” on an otherwise bleak situation. *Id.* at 37–38.

150. *Id.* at 28, 37.

organizations, and academic experts. But the increasing public commitment to decarcerate at least in certain jurisdictions alongside the current lack of viable proposed means to achieve that end creates a crucial, and perhaps more welcome, role for citizen engagement and expert guidance. As Gottschalk makes clear, it is no mystery to criminal law and sentencing experts what would be required to begin to decarcerate: decrease sentence lengths across the board (not only for less serious drug offenses), admit radically fewer people to jail and prison, reduce criminal filings, and constrain police and prosecutorial discretion.¹⁵¹ I would add to this, though Gottschalk focuses less on this point, a greater investment in other social projects to maintain some measure of public order and collective peace.¹⁵² At present, however, this is a reform agenda nowhere on Congress's or any state's agenda.

Proposals to reduce incarceration more substantially and to moderate criminal law enforcement across the board invariably raise questions about what impact these reforms would have on public safety. Or, to pose the question another way, to what extent did the U.S. prison boom reflect a response to rising crime, and to what degree is our large incarcerated population necessary to maintain relatively low levels of criminal victimization? As Gottschalk and others have shown, the factors that cause crime are largely independent of the factors responsible for high rates of incarceration.¹⁵³ Incarceration levels respond to legislatively and judicially established sentencing law—that is, to sentencing policy and political choices, not exclusively or even primarily to crime.¹⁵⁴ A U.S. National Research Council study has recently established, for example, that over the forty years when U.S. incarceration rates steadily increased, U.S. crime rates did not respond in any consistent manner: “the rate of violent crime

151. GOTTSCHALK, *supra* note 2, at 259–60, 262–63, 266–68; *see also* JAMES AUSTIN ET AL., *ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT* 5 (2013) (“[Our] vision calls for the creation of multi-sector campaigns coordinated by coalitions of locally based grassroots organizations, grass-tops leaders and in-state advocacy groups, national advocacy organizations, state and local lawmakers, researchers and policy analysts, and communications professionals. Together, these coalitions could identify the drivers of state and local corrections populations, the policy mechanisms needed to make major reductions in these correctional populations, and the pertinent political pressure points. They could mount sophisticated, multi-faceted public education campaigns. The overarching goals would be to create sustained demand for long-term corrections reform, major cuts in overall correctional populations, and establish investment in high incarceration communities.”).

152. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. REV.* 1156, 1163 (2015); *see also* AUSTIN ET AL., *supra* note 151, at 5 (discussing the importance of investment in high-incarceration communities alongside other criminal law reforms).

153. *See* GOTTSCHALK, *supra* note 2, at 259–60 (clarifying that the factors that cause crime are distinct from the issues of penal policy and law enforcement that cause high rates of incarceration).

154. *See id.* at 259 (observing that major decarcerations have occurred in other places by focusing on reforming penal and sentencing policy rather than focusing on the root causes of crime).

rose, then fell, rose again, then declined sharply.”¹⁵⁵ Consequently, the study relates: “The best single proximate explanation of the rise in incarceration is not rising crime rates, but the policy choices made by legislators to greatly increase the use of imprisonment as a response to crime.”¹⁵⁶ The National Research Council study concludes that the “increase in incarceration may have caused a decrease in crime, but the magnitude is highly uncertain and the results of most studies suggest it was unlikely to have been large.”¹⁵⁷

Still, even if current incarceration levels are not responsible for low crime rates, the Marshall Project tool makes clear that meaningful reform must confront the prevalence in prisons of persons classified as having committed violent and serious property offenses. Based on the Bureau of Justice Statistics data, it is plain that there are hundreds of thousands of people incarcerated for sex offenses, burglary, and other serious violent and property crimes.¹⁵⁸

This concern illuminates a crucial problem in the predominant conceptualization of how to decarcerate—a problem that is reflected in the design of the web-based sentencing reform tool itself, as well as in the data on which it relies. As Gottschalk demonstrates, many offenses classified as violent do not reflect what are commonly thought of as acts of violence: for instance, possession of a gun or statutory rape may be classified as violent offenses.¹⁵⁹ Likewise, a conviction for a property offense like burglary may describe a homeless person’s harmless trespass in an empty building, or it could describe conduct that provoked terror and resulted in grave harm.¹⁶⁰ More fundamentally, Gottschalk shows that “[d]rawing a firm line between nonviolent drug offenders and serious, violent, or sex offenders in policy debates reinforces the misleading view that there are clear-cut, largely immutable, and readily identifiable categories of offenders who are best defined by the offense that sent them to prison.”¹⁶¹ In reality, the category of offense in which a defendant falls is substantially based on the availability of evidence and is frequently arbitrary.¹⁶²

Nevertheless, a significant number of men and women are incarcerated for homicide offenses or for having perpetrated very serious harm against

155. NAT’L RES. COUNCIL, *supra* note 33, at 3.

156. *Id.*

157. *Id.* at 337.

158. Goldstein, *supra* note 144.

159. Leon Neyfakh, *OK, So Who Gets to Go Free?*, SLATE (Mar. 4, 2015), http://www.slate.com/articles/news_and_politics/crime/2015/03/prison_reform_releasing_only_no_nviolent_offenders_won_t_get_you_very_far.html [<http://perma.cc/MW3J-PVJ6>].

160. *See* GOTTSCHALK, *supra* note 2, at 183 (relating how the burglary of an unoccupied home was considered a violent offense under California’s Proposition 36).

161. *Id.* at 168.

162. *Id.* (citing Robert J. Sampson, *The Incarceration Ledger: Toward a New Era in Assessing Societal Consequences*, 10 CRIMINOLOGY & PUB. POL’Y 819, 823 (2011)).

other human beings.¹⁶³ How might we conceptualize a noncarceral means of addressing serious violent crime? A large body of research bears on this question. Criminologists have clarified, for example, the factors that are likely most consequential in producing higher rates of concentrated violent crime. These factors include especially high rates of poverty, high income inequality, residential segregation, and pervasive economic discrimination against certain groups.¹⁶⁴ While crime has fallen in the United States over the last decades, the most feared forms of violent crime remain highly concentrated in particular neighborhoods, especially those that are predominantly poor and African-American. As Gottschalk reports, the homicide rate in Chicago's Hyde Park neighborhood, which Obama calls home, is 3 per 100,000, while the homicide rate in nearby Washington Park, which is overwhelmingly poor and African-American, is 78 per 100,000.¹⁶⁵ For a young black man involved in a criminally active group on Chicago's west side, the homicide rate is 3,000 per 100,000—600 times higher than the national rate.¹⁶⁶

This combination of street violence, carceral control, and isolation from other public social support in poor African-American communities is conceptualized by political scientist Lisa L. Miller as “racialized state failure.” Miller explains: “African-Americans, far more than their white counterparts, experience a *failing state* characterized by the devastating dual problems of under-protection and over-enforcement of the law”¹⁶⁷

In her account of the homicide epidemic in the low-income, segregated African-American community of Watts, Los Angeles, Jill Leovy explores further these links between poverty, inequality, and the awful violence associated with certain underground economies.¹⁶⁸ Leovy focuses on the importance of criminally prosecuting these homicide cases given that so many killings of African-American youth are never solved. She also provides a rich description of how young people, unable to find other forms of self-support, often turn to the underground economy and to crime, fueling violence:

163. *Id.* at 178.

164. *Id.* at 277; KAREN F. PARKER, UNEQUAL CRIME DECLINE: THEORIZING RACE, URBAN INEQUALITY, AND CRIMINAL VIOLENCE 114–20 (2008); Patricia L. McCall et al., *An Empirical Assessment of What We Know About Structural Covariates of Homicide Rates: A Return to a Classic 20 Years Later*, 14 HOMICIDE STUD. 219, 226–28, 235–36 (2010); Steven F. Messner, *Economic Discrimination and Societal Homicide Rates: Further Evidence on the Cost of Inequality*, 54 AM. SOC. REV. 597, 607 (1989); Robert J. Sampson, *Urban Black Violence: The Effect of Male Joblessness and Family Disruption*, AM. J. SOC. 354, 376–78 (1987).

165. GOTTSCHALK, *supra* note 2, at 276–77.

166. *Id.* at 277.

167. Lisa L. Miller, *Reforming Police and Prisons Will Not Save Us*, BALKINIZATION (Aug. 10, 2015), <http://balkin.blogspot.com/2015/08/reforming-police-and-prisons-will-not.html> [<http://perma.cc/KKS9-NKXC>].

168. JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA (2015).

When your business dealings are illegal, you have no legal recourse. Many poor, “underclass” men of Watts had little to live on except a couple hundreds dollars a month in county General Relief. They “cliqued up” for all sorts of illegal enterprises, not just selling drugs and pimping but also fraudulent check schemes, tax cons, unlicensed car repair businesses, or hair braiding. Some bounced from hustle to hustle. They bartered goods, struck deals, and shared proceeds, all off the books. Violence substituted for contract litigation. Young men in Watts frequently compared their participation in so-called gang culture to the way white-collar businesspeople sue customers, competitors, or suppliers in civil courts. They spoke of policing themselves, adjudicating their own disputes.¹⁶⁹

Greater access to money in neighborhoods with concentrated poverty and crime would considerably reduce the violence associated with the underground economy, the fallout from which accounts for a large proportion of homicides.¹⁷⁰ Leovy describes how even a very modest increase in public benefits in the mid-2000s paid to indigent African-Americans, especially young men, in South Central Los Angeles may have functioned to transform certain of the dynamics in underground markets fueling the homicide epidemic, and how the killings modestly subsided.¹⁷¹

169. *Id.* at 79; *see also* BASTARDS OF THE PARTY (2005) (exploring the emergence and life of the Bloods and Crips gangs in Los Angeles written by a former member of the Bloods).

170. *See* LEOVY, *supra* note 168; *see also* Miller, *supra* note 167 (“Such policies, for example, the GI Bill, have helped make society more secure for whites; but the life course of Black Americans reveals the persistent failure of state institutions to work proactively to provide the same protections from risk to which whites are privilege[d]. . . . The biggest flaw of American democracy with respect to African-Americans is not that the state does too much but, rather, that [it] has done *too little* to help generate the kinds of safety, prosperity and security from the state that Whites enjoy.”).

171. *See* LEOVY, *supra* note 168, at 317–18. As Leovy describes:

The federal Second Chance Act in 2005 inspired new efforts to provide SSI [Supplemental Security Income, a payment available to people with disabilities] to prisoners upon reentry; many prisoners qualify, since a third of the state’s inmates have been diagnosed with mental illness. As we have seen, autonomy counters homicide. . . . Money translates to autonomy. Economic autonomy is like legal autonomy. It helps break apart homicidal enclaves by reducing interdependence and lowering the stakes of conflicts. The many indigent black men who now report themselves to be “on disability” . . . signal an unprecedented income stream for a population that once suffered near-absolute economic marginalization. An eight-hundred-dollar a month check for an unemployed black ex-felon makes a big difference in his life. The risks and benefits of various hustles surely appear different to him. He can move, ditch his homeys, commit fewer crimes, walk away from more fights.

Id. at 317. Other factors Leovy notes that may have contributed to a decline in homicides in South Los Angeles include the increased reliance on cellphones to conduct drug sales indoors, the relative increase in abuse of legal pharmaceutical drugs as compared to narcotics sold exclusively on the underground market, and the popularity of video games that keep adolescents inside. *Id.* at 317–18.

Apart from efforts to address violence by targeting its underlying causes, such as reducing reliance on underground economies for basic survival needs, experts disagree on how much to credit policing resources and strategies for reductions in crime, as Gottschalk helpfully explains.¹⁷² It is likely that a heavy police presence in areas frequented by criminally active individuals and groups reduces some criminal activity—an approach referred to as “hot spot” policing.¹⁷³ And if the only two available options are to (1) use intense police presence to prevent crime or (2) wait for people to commit violent crime and then arrest and incarcerate them, then hot spot policing may well be preferable to the alternative. But as Jazz Hayden, an advocate in the campaign to end New York’s “stop and frisk” program, notes, “[t]urning our communities into open-air prisons is not the solution to violence” or to mass incarceration.¹⁷⁴ There are other ways we might aim to reduce both interpersonal harm and incarceration, which do not involve exclusive reliance on an aggressive criminal law enforcement presence in low-income communities.

In confronting violent crime, for example, current reform efforts might also benefit from considering how concerned citizens could work to prevent violence and other forms of interpersonal harm without relying on the threat of imprisonment, policing, or other newfangled surveillance technologies. “Violence Interrupters,” “Sistas Liberated Ground,” and community-based urban revitalization projects that reclaim abandoned public space offer examples of communities organizing themselves to promote security from violence without calling for an aggressive police or other surveillance presence.¹⁷⁵ The Violence Interrupters—now operating as the Cure Violence and Safe Streets initiatives—are a task force of mediators, many formerly gang-involved, convened in communities around the country who may be called upon to help de-escalate situations of mounting community conflict, whether gang-related or otherwise.¹⁷⁶ The work of Violence Interrupters in Chicago and Baltimore is credited with decreasing homicides, according to studies conducted by researchers at Northwestern

172. GOTTSCHALK, *supra* note 2, at 278.

173. See FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME AND ITS CONTROL* 107–08 (2012) (describing experiments with a version of problem-solving policing generally called “hot spots” patrol enhancement, targeted either on crack houses or other places with extremely high violent crime or drug activity); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 *CRIMINOLOGY & PUB. POL’Y* 13, 34–35 (2011) (discussing the efficacy of hot spot policing).

174. MAYA SCHENWAR, *LOCKED DOWN, LOCKED OUT: WHY PRISON DOESN’T WORK AND HOW WE CAN DO BETTER* 133 (2014).

175. McLeod, *supra* note 152, at 1227–29.

176. Daniel W. Webster et al., *Effects of Baltimore’s Safe Streets Program on Gun Violence: A Replication of Chicago’s CeaseFire Program*, 90 *J. URB. HEALTH* 27, 28 (2012).

and Johns Hopkins University.¹⁷⁷ Homicide rates reportedly decreased in one neighborhood by over 50%.¹⁷⁸

The Brooklyn-based organization “Sistas Liberated Ground” (SLG) is composed of local women of color who work together to hold others in their community accountable for domestic violence and seek to empower vulnerable individuals to keep themselves safe, locate safe spaces, access mediation, and address their needs for security outside the criminal process if they choose.¹⁷⁹ These antiviolence mediation projects promise to help keep people secure without police involvement or threats of imprisonment. Certain cities are also beginning to experiment with paying violence mediators to reduce crime.¹⁸⁰

Large-scale, community-led urban regeneration projects in areas that have been essentially abandoned also serve to bring community members out into public space and similarly stand to improve safety and security without relying on hot spot policing or other carceral responses.¹⁸¹ These efforts do not operate at scale, nor would they be adequate to prevent violence altogether, but if further resources were allocated to large-scale regeneration projects and the impoverished communities where they operate, there is good reason to believe their impact in promoting community security and well-being would expand. In addition, an infusion of resources to areas most besieged by violence would create opportunities for people and communities devastated by criminal violence and aggressive policing to participate in devising other means of ensuring collective security.

Black Lives Matter and affiliated organizations have created an independent public space for intraracial and interracial exchange about other forms of criminal law enforcement violence, and in so doing these efforts have reshaped in some measure public understanding of the relative costs and benefits of policing as compared to other forms of ensuring

177. *Id.* at 28, 38.

178. *Id.* at 38.

179. McLeod, *supra* note 152, at 1217.

180. See, e.g., Richard Gonzales, *To Reduce Gun Violence, Potential Offenders Offered Support and Cash*, NPR (March 28, 2016, 4:00 PM), <http://www.npr.org/2016/03/28/472138377/to-reduce-gun-violence-potential-offenders-offered-support-and-cash> [<https://perma.cc/M34Z-LXKZ>].

181. See Charles C. Branas et al., *A Difference-in-Differences Analysis of Health, Safety, and Greening Vacant Urban Space*, 174 AM. J. EPIDEMIOLOGY 1296, 1296 (2011) (discussing the manner in which green spaces can decrease criminal activity); Michaela Krauser, *The Urban Garden as Crime Fighter*, NEXT CITY (Aug. 22, 2012), <http://nextcity.org/daily/entry/the-urban-garden-as-crime-fighter> [<http://perma.cc/H2MQ-M747>] (noting inconsistent results across cities that seek to reduce crime by increasing urban green space); Eugenia C. Garvin et al., *Greening Vacant Lots to Reduce Violent Crime: A Randomised Controlled Trial*, 19 INJ. PREVENTION 198, 201 (2013) (concluding that, while the addition of green space to an urban area had a nonsignificant net reduction in total crime at the greening site, it led to a net increase in residents' perceptions of the area's safeness).

collective well-being. Among their many important contributions, these fora have allowed certain communities to bring to wider public attention a quality of violence associated with our carceral state that is not captured by the scale of mass incarceration but targets with horrific specificity black bodies—outside of jails and prisons, at the pool, in cars, or on the street. This violence is characterized by both an absence of meaningful state support and protection and excessive exposure to police abuse.¹⁸²

What all of this makes clear is that although incarceration and predatory policing could be reduced without addressing the root causes of crime—simply by changing sentencing law and policy—to address concentrated violent crime in tandem with substantial decarceration will require allocation of public resources to alleviate poverty, provide adequate mental health care, public health services, public education, and reduce inequality. And while rejuvenating public discourse and promoting citizen engagement may influence carceral practices even without legislative change, as the case of New York again potentially illustrates, legislative and other political and legal processes should not be conceptualized as necessarily static either. Notwithstanding the current entrenched interests and formidable obstacles to more substantial legislative action in Congress and many states, legal and political processes, too, are at least subject to sudden shifts and the use of tactics. It is not unthinkable that measures that constrain police discretion to arrest for minor offenses, for example, or increase good-time credits and other means of backdoor sentencing reform could function as means of tactically advancing a meaningful agenda for change even in the contemporary, often-stymied legislative arena.

Legislative efforts focused on drug law reform are after all increasingly comprehensive—containing many distinct measures in separate and combined bills, with various moving parts—creating an opening to include less visible provisions that more meaningfully adjust criminal law and policy.¹⁸³ Multipart reform bills may incorporate numerous provisions that reach far beyond the most low-level, insignificant drug offenses.¹⁸⁴

Although Gottschalk warns that sentencing reform carving out specific, more sympathetic categories of convicted individuals may legitimate punitive criminal enforcement more generally, it is likely that the felt urgency of reform will remain because any particular category of narrow reform will do so little to reduce the vast scale of U.S. penal

182. *See generally, e.g.,* Hansford, *supra* note 17.

183. *See, e.g.,* Sensenbrenner–Scott SAFE Justice Reinvestment Act of 2015, H.R. 2944, 114th Cong. (2015) (combining in one bill many aspects of other proposed federal criminal law reforms).

184. *Id.*

practices.¹⁸⁵ A further role for expert input might involve identifying other technical, backdoor measures to constrain carceral severity and violence. And while Gottschalk generally dismisses “technicist” fixes to carceral reform as misguided given the ultimately political character of criminal punishment,¹⁸⁶ some less visible technical measures may hold significant potential to reduce penal harshness. For example, John Pfaff attributes the rise of mass incarceration in significant part to prosecutors’ decisions to charge certain cases as felonies rather than lesser offenses and to seek prison time where previously they had not.¹⁸⁷ If Pfaff’s analysis accurately reflects part of what explains federal-level and particular state-level incarceration patterns, that could generate popular and possibly ultimately legislative support for prosecutorial guidelines and other measures to cabin such discretion.¹⁸⁸ Even if prosecutors adamantly resisted this development and inhibited legislative or popular action, calling more public attention to irresponsible charging decisions might in itself influence prosecutorial behavior in a more moderate direction.

In summary, the inadequacy of proposed drug law and related reform stands in sharp contrast to a reformist trend centered on reducing state

185. See GOTTSCHALK, *supra* note 2, at 165 (“Drawing a firm line between the non, non, nons and other offenders has contributed to the further demonization of people convicted of sex offenses or violent crimes in the public imagination and in policy debates.”). Notably, too, several progressive criminal law reform organizations withheld support for California’s Proposition 47—a ballot initiative which passed in late 2014, reducing various low-level drug and other nonviolent offenses in California from felonies to misdemeanors—on the ground that it hardened distinctions between those serving sentences for these crimes and for more serious felony offenses in a manner that would ultimately further entrench harsh punitive practices and large-scale incarceration. See, e.g., *A Few Views on Prop 47*, FLYING OVER WALLS (Nov. 13, 2014), <https://flyingoverwalls.wordpress.com/2014/11/03/a-few-views-on-prop-47/> [<http://perma.cc/WEJ5-2RK4>] (“The initiative strengthens the idea that those with certain violent felony convictions should not be part of the sentencing reform discussion. These convictions in many cases can be attributed to the structural racism, sexism and classism of the criminal legal system. When ‘violent felony convictions’ becomes the dividing line for sentencing reform it reinforces the idea that such convictions are just and acceptable. Because it demonizes people with prior convictions, the disparities and racism of the existing system will be reinforced and deepened . . .”). Perhaps it should be noted, though, with more emphasis than in Gottschalk’s account, that drug law reform stands to improve the life chances of hundreds of thousands of people sentenced for drug offenses. There are at any given time approximately 200,000 people in prison on drug charges, and during the period 2000–2012, 1.6 million people passed through state prisons as a consequence of a drug offense. See Pfaff, *supra* note 14, at 178.

186. See GOTTSCHALK, *supra* note 2, at 278 (asserting that a technicist approach “is inattentive to the important political and symbolic dimensions of crime prevention and penal policy more generally”).

187. Pfaff, *supra* note 14, at 198.

188. Gottschalk, in her brief discussion of untapped resources that might serve to modestly reduce incarceration and rein in the carceral state, focuses especially on prosecutorial and executive discretion, although these measures enter her analysis almost as an afterthought and receive little by way of sustained analysis. See GOTTSCHALK, *supra* note 2, at 266 (asserting that “[t]o reduce the imprisonment rate, prosecutors will have to be cajoled or pressured into embracing a commitment to send fewer people to prison and to reduce sentence lengths”).

criminal expenditures while advancing other regressive fiscal policy initiatives. The important distinctions between these various criminal law reform projects should be identified and confronted rather than conflated or overlooked.

Yet, any of these various projects may well be tactically engaged to achieve other, more transformative goals. In the end, after all, there is generally no way out but through. There is no way of confronting present injustice other than by making do—making the most of the opportunities and circumstances at hand. Despite their limitations and perils, if drug law and neoliberal penal reform in more conservative jurisdictions modestly reduce carceral severity and are the only reform inroads available, these initiatives may be preferable to any plausible alternatives and to the status quo. In many places, both impulses may be necessary to achieve majority support. Still, in the process of engaging achievable near-term reform projects, it remains critical to be vigilant about less visible threats posed by certain reform agendas as well as to attend to more promising visions of how to dismantle the carceral state, both for the possibilities of a noncarceral future those visions may hold, and because they may orient the tactical engagement of near-term reform toward more promising aspirational horizons.

III. Imagining Beyond the Carceral State

To project a longer-term vision of carceral change, this Part focuses on Finland's dramatic decarceration and on the movement for racial justice in U.S. criminal law enforcement. Finland, like the United States, once faced levels of incarceration far in excess of its peer states, but managed to radically moderate its punitive practices through a sustained project of criminal law reform alongside a more general reconfiguration of social policy. This Part also looks to the Black Lives Matter movement, where a related critique and reform program are taking shape. This critique focuses on particular threats to black life in the United States, but opens into a wide-ranging and profound challenge to the U.S. carceral state and its associated political, legal, and economic orders.

A. *Finland's Dramatic Decarceration and Nordic Abolitionist Reform*

The Nordic prison movement took shape in the late 1960s, inspired by the student revolts and political protest of that period, with the aim of fundamentally reforming imprisonment and reconfiguring regimes of social control in more humane and egalitarian terms.¹⁸⁹ The movement sought to

189. See THOMAS MATHIESEN, *THE POLITICS OF ABOLITION REVISITED* 5 (2015).

humanize the treatment of prisoners and to reduce, and perhaps abolish altogether, the use of incarceration.¹⁹⁰

Thomas Mathiesen—a Norwegian social theorist, criminologist, and prison movement participant—has published an account of the Nordic prison movement, which offers, in his words, an “ethnographic description”¹⁹¹ of “our common experiences in written form.”¹⁹² According to Mathiesen, the Swedish organization Kriminalvårdens Humanisering, or Correctional Humanization (KRUM), inaugurated the Scandinavian prison movement with a national meeting in 1966 called “The Parliament of Thieves.”¹⁹³ The Parliament of Thieves convened for the first time in history large numbers of prisoners furloughed from confinement and ex-prisoners who spoke with the audience and the press about their lives in prison.¹⁹⁴ Movement participants came to believe “prisons were inhumane and did not work according to plan.”¹⁹⁵ The movement in Sweden and neighboring countries focused initially on incarceration levels and prison conditions in order to raise awareness and generate momentum for radical reform.¹⁹⁶ Current and former prisoners themselves played a major role: “[P]risoners were to be brought into the organization as active participants.”¹⁹⁷

The Finnish counterpart KRIM had a large membership among the prisoners, while the Finnish November movement was a more politically oriented pressure group.¹⁹⁸ Like its counterpart in Sweden, Finnish KRIM convened study groups in prisons, cultural programs for prisoners, and other humanitarian activities and advocacy initiatives.¹⁹⁹ Through the active involvement of prisoners, the movement “had fresh unbureaucratic information on what was going on in . . . prisons.”²⁰⁰ Prisoners staged repeated hunger strikes and other protests. Mathiesen notes that “the

190. *See generally id.*

191. *Id.* at xvi.

192. *Id.* at xvii.

193. Movement organizations included KRUM in Sweden, founded in 1966; KRIM in Denmark, established in 1967; KROM in Norway, established in 1968; and, in Finland, the November movement and KRIM, founded in 1967 and 1968. *Id.* at 5. The analysis in this Part draws on a companion essay in *Harvard Unbound*. *See* Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109 (2013).

194. MATHIESON, *supra* note 189, at 5.

195. *Id.* at 9.

196. *Id.*

197. *Id.*

198. *Id.* at 77.

199. *Id.* at 77–78.

200. *Id.* at 38.

involvement of prisoners was certainly a novelty, and caused great alarm and major write-ups in the mass media at the time.”²⁰¹

Around that time, in 1970, the United States had the highest incarceration rate of Western industrialized countries, with approximately 166 people per 100,000 inhabitants; Finland had the second highest incarceration rate, with roughly 113 prisoners per 100,000 inhabitants.²⁰² Today, the United States’s incarceration rate has increased many fold to 748 per 100,000 inhabitants, while Finland has reduced its incarceration rate drastically, by approximately 50%, to 59 prisoners per 100,000 inhabitants, and otherwise has fundamentally reformed its criminal law and policy. Many of the relatively small number of remaining Finnish prisoners are confined in “open prisons” where they work and interact with others outside the prison setting, following short and humane periods of limited detention.²⁰³ Finland has further humanized its penal policy by replacing penal intervention with other social projects in various domains—using situational crime prevention and developing a robust welfare state.²⁰⁴

The earlier harshness of Finnish penal practices compared to its neighboring countries arose after a century of Russian occupation, unrest, and war. Finland has a longstanding and close relationship with both Sweden and Russia.²⁰⁵ Although Finland was a part of Sweden up until 1809, the country was occupied by Russia for more than one hundred years, from 1809 until 1917.²⁰⁶ The Finnish penal system was constituted during the period of Russian occupation.²⁰⁷ Consequently, by the mid-twentieth century, Finnish criminal sanctions were much harsher than those of Finland’s Nordic neighbors.²⁰⁸ Provisions of the Criminal Code of 1889 were still in force, and there was frequent recourse to incarceration even for relatively minor social-order violations.²⁰⁹ Not only was Finland’s prison population much larger than its Nordic neighbors, and its punishments harsher, but the Finnish state also relied broadly on criminal regulation to

201. *Id.* at 9.

202. *See id.* at 7.

203. *Id.*

204. *See* Tapio Lappi-Seppälä, *Imprisonment and Penal Policy in Finland*, 54 SCANDINAVIAN STUD. L. 333, 350 (discussing the period of Finland’s criminal reform in which “the arsenal of the possible means of criminal policy expanded in comparison with the traditional penal system”).

205. Lappi-Seppälä, *supra* note 24, at 92.

206. *See id.* (“Finland remained an autonomous grand duchy of the Russian Empire (but still maintain[ed] its own laws).”).

207. *See id.* at 92–93 (noting the evolution of the penal system from the original Criminal Code of 1889, and that the Code is still formally in force).

208. *Id.*

209. *See id.* at 113–16 (noting that the Finnish prison population fell after high minimum penalties for petty property offenses were reduced and drunken driving was no longer punished by incarceration).

achieve social order as opposed to other social measures.²¹⁰ Whereas other Scandinavian states already were established as welfare states—and prison-movement activists in those countries invoked welfare-state traditions with the goal of extending social concern to prisoners—Finland did not have the same welfare-state tradition, and it was in part through its reconsideration of the legitimacy of its penal practices that a Finnish welfare state took shape.²¹¹

By the late 1960s, many in Finland began to regard its high incarceration rate as a disgrace and source of shame.²¹² This sense of shame associated with the perceived overuse of prison gave way to a consensus that it was both necessary and possible to change.²¹³ While incarceration rates in almost every other country modestly increased over the late-twentieth and early-twenty-first centuries, Finland alone has drastically reduced its incarcerated population.²¹⁴

Actively responding to the sense of shame in its high levels of punitiveness and imprisonment, Finland engaged simultaneously in specific reform and in an effort to reconfigure more fundamentally the punitive orientation of the Finnish state.²¹⁵ As Finland sought to reduce its incarcerated population, it lowered sentences and increased judicial discretion with respect to all categories of offenses.²¹⁶ The core predicate factor, however, as understood by scholars of Finnish criminal policy, was the “attitudinal readiness of the civil servants, the judiciary, and the prison authorities to use all available means in order to bring down the number of prisoners.”²¹⁷ Officials in Finland had come to believe that higher

210. *Id.* at 108.

211. Mathiesen explains that central to the emergence of the Norwegian prison movement, its “anger and consternation,” was the sense that despite the advent of the welfare state, prisoners “were left behind the general development,” “hidden or forgotten,” and “in drastic need of help.” The prison movement embraced the Scandinavian welfare states and sought to improve and extend their reach to incorporate those consigned to prisons. Mathiesen writes of the Norwegian prison-movement organization:

[W]e basically stayed on the “side” of Norwegian society. We basically like (if you can use such a word) the Norwegian state. The Norwegian state had its definite basic shortcomings in the area which concerned us, criminal policy, and we had clear misgivings about it, but we thought that some or many of them could be improved with time.

Id. at 10, 38.

212. Stan C. Proband, *Success in Finland in Reducing Prison Use*, in *SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE* 187, 188 (Michael Tonry & Kathleen Hatlestad eds., 1997).

213. *Id.*

214. *Id.* (comparing Finland to fifteen other Western countries and concluding that “the Finnish experience is not common Most countries either had stable populations or increases of as much as 100 percent. Only in Finland did the prison population decline substantially.”).

215. Lappi-Seppälä, *supra* note 24, at 108.

216. *Id.* at 113–14.

217. Proband, *supra* note 212, at 189.

incarceration rates do not produce a safer society, and they were moved to action by the sense of discord between a commitment to certain humanitarian and libertarian values and Finland's heavy reliance on imprisonment.²¹⁸

This account of how collective shame may motivate transformative change challenges a prominent view in philosophical and social-theoretical scholarship that shame tends to promote reactionary and repressive responses.²¹⁹ Yet, as the experience of Finnish decarceration illustrates, a sense of collective disgrace may also motivate self-correction and reconstitution of the terms of political engagement.

The initial Finnish criminal reforms took place in the early 1970s.²²⁰ A complete reform of the criminal code began in 1972.²²¹ The minimum sentence for parole eligibility was shortened first to six months and then to fourteen days in 1989.²²² Parole was to be automatically granted to all first-time offenders after serving half their sentences.²²³ Mediation was adopted as an alternative to criminal prosecution upon agreement of all the parties,

218. *See id.* at 188–89 (noting that Finnish officials saw the high prisoner rate as a “disgrace” and were “embarrassed” by where the country ranked in relation to other nations).

219. Martha Nussbaum, for example, understands shame—the state in which one recognizes oneself “falling short of some desired ideal”—as a negative emotion, one of “compassion’s enemies.” MARTHA C. NUSSBAUM, *POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE* 314, 361 (2013). According to Nussbaum, whereas the “natural response of guilt is apology and reparation; the natural reflex of shame is hiding.” *Id.* at 361. Although Nussbaum acknowledges that shame may be constructive, far more often, in Nussbaum’s analysis, “shame fractures social unity, causing society to lose the full contribution of the shamed.” *Id.* at 364. Guilt is distinguished from shame, on Nussbaum’s account, in that guilt “pertains to an act (or intended act); shame is directed at the present state of the self.” *Id.* Political theorist Jon Elster argues that “[i]n shame, the immediate impulse is to hide, to run away, to shrink Sometimes, shame can induce aggression, not only as a reaction to shaming . . . but also as a way of leveling the playing field.” JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* 153 (1999). Social theorist Sara Ahmed writes of shame likewise that it, “in exposing that which has been covered[,] demands us to re-cover.” SARA AHMED, *THE CULTURAL POLITICS OF EMOTION* 104 (2004). *But see* ELSPETH PROBYN, *BLUSH: FACES OF SHAME*, at xiii (2005) (“Shame . . . can entail self-evaluation and transformation As such, shame promises a return of interest, joy, and connection.”); CHRISTINA H. TARNOPOLSKY, *PRUDES, PERVERTS, AND TYRANTS: PLATO’S GORGIAS AND THE POLITICS OF SHAME* 9 (2010) (arguing that human beings may respond to shame in public discourse by attempting to understand themselves better and to change so that their behavior and their ideals are in closer accord); BERNARD WILLIAMS, *SHAME AND NECESSITY* 90 (1993) (“[S]hame may be expressed in attempts to reconstruct or improve oneself.”). This is decidedly not an argument regarding shaming as a form of punishment, but an account of how collective shame may motivate a profound reckoning with and dismantling of a carceral state. *Cf.* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (exploring shaming penalties).

220. Lappi-Seppälä, *supra* note 204, at 93.

221. *Id.*

222. *Id.* at 119.

223. Patrik Törnudd, *Sentencing and Punishment in Finland*, in *SENTENCING REFORMS IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE* 189, 192 (Michael Tonry & Kathleen Hatlestad eds., 1997).

and successful mediation might conclude in a nonprosecution or a waiver of sentence for the accused.²²⁴ Finnish legislators further redefined the crime of theft and imposed substantially shorter sentences for property offenses.²²⁵ The number of prison sentences imposed for theft fell by 27% from 1971 to 1991.²²⁶ The median prison-sentence length for theft decreased from twelve months in 1950 to two and a half months in 1991.²²⁷ Finland also expanded judicial discretion to impose fines or conditional (suspended) sentences for Driving While Intoxicated (DWI) offenses.²²⁸ The rate of DWI offenders who received custodial sentences fell dramatically, and many DWI offenders now are sentenced only to community service.²²⁹ By contrast, in Texas, jail time is often imposed for first-time, minor DWI offenses, and recidivist DWI offenders face between two and ten years of imprisonment.²³⁰ Finland also significantly reduced the incarceration of juveniles.²³¹

Fines are assessed as a percentage of a person's daily pay, dependent on income, rather than setting fines as a fixed sum that attaches to a given offense.²³² The sentence of life imprisonment may only be imposed for genocide, treason, or certain aggravated murder offenses, though life-sentenced prisoners are generally released after ten to twelve years by presidential pardon.²³³ Typically, sentences can be no more than twelve years for a single offense and fifteen years for several offenses, and most sentences are far shorter than this.²³⁴ Many sentences are conditional; the person sentenced remains at liberty, effectively on probation or parole.²³⁵ Conditional sentences may be applied for a wide range of offenses, and those subject to conditional sentences have no reporting terms but may access services without punitive or surveillance conditions.²³⁶ Finland's

224. Lappi-Seppälä, *supra* note 24, at 96.

225. *Id.* at 113.

226. *Id.*

227. *Id.* at 114.

228. *Id.* at 115–17.

229. *Id.*

230. Third-time DWI offenders are guilty of a third degree felony, TEX. PENAL CODE ANN. § 49.09 (West 2015), which carries with it a two-to-ten year sentence. *Id.* § 12.34.

231. Lappi-Seppälä, *supra* note 24, at 117–18.

232. *Id.* at 94; Törnudd, *supra* note 223, at 191.

233. Lappi-Seppälä, *supra* note 24, at 94.

234. *Id.* at 94 (“A sentence of imprisonment may be imposed either for a determinate period (at least fourteen days and at most twelve years for a single offense and fifteen years for several offenses) or for life.”).

235. *Id.* at 95.

236. *See id.* at 94–95 (“Sentences of imprisonment of at most two years may be imposed conditionally, provided that ‘the maintenance of general respect for the law’ does not require an unconditional sentence. . . . An offender who is sentenced conditionally is placed on probation for one to three years. For adults, such probation does not involve supervision. . . . [T]he law no longer contains any other behavioral restrictions or conditions for the offender.”).

dramatic decarceration illustrates, among other lessons, that the use of imprisonment may be radically reduced without introducing much in the way of new alternative sanctions.²³⁷

In lieu of achieving collective security primarily through criminal law enforcement, reformers promoted the idea of social prevention of crime in Finland and throughout Scandinavia.²³⁸ The concept was to ensure collective security, to the greatest extent possible, without relying on prisons policing, or other forms of surveillant control.²³⁹ In Finland, it came to be accepted that “convincing crime prevention [operates] . . . outside the domain of criminal law” through situational prevention and social policy interventions like quality education and other flourishing social welfare institutions.²⁴⁰ Organizing slogans captured the idea that “[g]ood social development policy is the best criminal policy” and “[c]riminal policy is an inseparable part of general social development policy.”²⁴¹ Other animating ideas included the “principle of normalization,” which aims to make prison conditions as much like living conditions in society in general as possible, with the understanding that the punishment is to be limited to the deprivation of liberty, without further state-imposed suffering.²⁴² The use of “open” prisons, from which sentenced persons may come and go, arose in accord with this idea.²⁴³ Reformers focused on the “minimization,” rather than elimination, of crime in order to properly calibrate expectations regarding risk and security.²⁴⁴ Reformers also emphasized the principle of “fair distribution”—that is, to fairly distribute costs of crime and crime prevention among the offender, the victim, and society, with society bearing some of the cost through enabling situational prevention and social welfare projects that tend, among other welfare-enhancing consequences, to reduce crime.²⁴⁵ As a consequence, “punishment, once regarded as the primary means of criminal policy, came to be seen as only one option among many.”²⁴⁶

237. Proband, *supra* note 212, at 194.

238. *Id.* at 190 (“The rationale of the criminal justice system is usually thought to be *general prevention*—not *general deterrence*. . . . In the Nordic countries, the concept of general prevention is strongly connected with the idea that a properly working criminal justice system has powerful indirect influences on peoples’ beliefs and behavior. General deterrence is an element of general prevention, but the deterrence mechanisms are not necessarily the most important ones in maintaining respect for the law. It is, however, necessary that citizens perceive the system to be reasonably efficient and legitimate. Such a system promotes internalization and acceptance of the social norms lying behind prohibitions of the criminal law.”).

239. *Id.* at 189.

240. Lappi-Seppälä, *supra* note 24, at 139–40.

241. *Id.* at 108.

242. *Id.* at 100.

243. *Id.*

244. *Id.* at 108.

245. *Id.*

246. *Id.* at 109.

Mathiesen identifies two related, more general objectives of the Nordic prison movement: First, “[i]n the short run to tear down all walls which are not strictly speaking necessary: to humanize the various forms of imprisonment, and to soften the suffering which society inflicts on its prisoners.”²⁴⁷ And second, “in the long run to change general thinking concerning punishment, and to replace the prison system by up-to-date and adequate measures”—measures that would substitute other social projects for criminal regulation.²⁴⁸

According to Mathiesen, after an initial period of focusing on prison reform to implement a treatment philosophy, this substitutive social program came to be understood by many in the Nordic prison movements in terms of the *abolition* of prisons.²⁴⁹ “What does it mean to be an ‘abolitionist?’” Mathiesen reflects. “Why do I call myself an abolitionist?”²⁵⁰ Abolition should be understood, Mathiesen proposes, as “a stance,” a guiding ideal, “the attitude of saying ‘no’” to building prisons as a way of responding to shared social concerns.²⁵¹ Prison abolition seeks a world without prisons, where both penal institutions and the harms posed by dangerous people are eliminated, to the greatest extent possible by nonpenal measures that facilitate peaceful coexistence. Though it “will not occur in our time,” prison abolition may serve as “a guiding ideal for the future,”²⁵² Mathiesen suggests, and in the present, its identifying character would be this “generalized ‘no!’” to prisons whenever and wherever possible.²⁵³ In the immediate term, then, in the Nordic prison movement, an abolitionist stance captured “a constant and deeply critical attitude to prisons and penal systems as human (and inhumane) solutions.”²⁵⁴

This stance, this refusal, the generalized “no” to prisons, may be conceptualized also in reference to what Bernard Harcourt calls “political disobedience.”²⁵⁵ Harcourt writes: “political disobedience resists the very way we are governed. . . . It refuses to willingly accept the sanctions meted out by our legal and political system. It challenges the conventional way in which political governance takes place and laws are enforced. . . . And it

247. MATHIESEN, *supra* note 189, at 80.

248. *Id.*

249. *Id.* at 9.

250. *Id.* at 3.

251. *Id.*

252. *Id.*

253. *Id.* at 34.

254. *Id.* at 32.

255. Bernard Harcourt, *Political Disobedience*, in *OCCUPY: THREE INQUIRIES IN DISOBEDIENCE* 45, 47 (W.J.T. Mitchell et al. eds., 2013).

turns its back on conventional political ideologies.”²⁵⁶ It is a resistance not to being governed, but “to being governed *in this way*.”²⁵⁷

Mathiesen acknowledges abolition may have been and may still be a “wild thought.” “But,” he urges, “the times need wild thoughts.”²⁵⁸ Along these lines, Mathiesen explains, the Nordic prison movement “argued in a new (and, I think, convincing) way.”²⁵⁹ Convincing both because of the attention it commanded in its bold wildness and because “[a]t the time we were professionally on the top of our field and could compete successfully with almost anyone, certainly the top men in the prison administration.”²⁶⁰ As with the active involvement of prisoners, Mathiesen reports, the abolitionist orientation of the movement “created alarm and sensation in the mass media of the time,” generating further attention to the cause of prison reform.²⁶¹

256. *Id.*

257. *Id.* at 53. One perhaps unexpected site of a more recent abolitionist “no” is the refusal of a U.S.-based architectural association to participate in prison construction—the organization Architects/Designers/Planners for Social Responsibility (ADPSR) has boycotted all prison-related projects, concluding that prisons are a “moral blight on society” and an “economic burden.” Yvonne Jewkes, *Afterword: Abolishing the Architecture and Alphabet of Fear*, in *THE POLITICS OF ABOLITION REVISITED*, *supra* note 189, at 321, 324. Architect Raphael Sperry, who organized the Prison Design Boycott Campaign in the United States to encourage architects to quit building prisons, exhorts architects instead to engage in “making our country and our world a more sustainable, prosperous, beautiful place. . . . Saying ‘no’ to prisons is a very important part of that. Saying we’re going to make prettier prisons, it’s not part of that.” See Troy Fuss, *Rethinking Prison Design: Is It Time to Throw Away the Key to Prison Architecture?*, *L.A. ARCHITECT* May/June 2002, at 62, 64. For Sperry, as for the Nordic prison movement, this abolitionist stance is in part about refusing prison construction, but it is as importantly about building flourishing spaces and communities outside of prison. Sperry explains:

[W]e have a lot of communities that fail their residents because they leave them without hope and without opportunity, and it would take a major national program to build a resurgence in those communities. And we’d like architects, designers, and planners to be engaged in that. . . . [B]uilding prisons detracts from the opportunity to do that . . . because the mentality that licenses the world’s largest per capita prison population is incapable of envisioning these kinds of safe, prosperous, contented communities for everybody.

Id.

258. MATHIESEN, *supra* note 189, at 35.

259. *Id.* at 38.

260. *Id.*

261. *Id.* at 9. Apart from generating media attention, a further important goal of the Nordic prison movement was to create what Mathiesen calls “an alternative public space”—a space where “argumentation and principled thinking represent the dominant values.” *Id.* at 28. This required in certain instances a willingness to operate without seeking mainstream media coverage, to engage in discussions beyond those which might be palatable for a popular television or newspaper audience. *Id.* at 28–29. Mathiesen explains that an alternative public space is one where intellectuals—social scientists, artists, scientists, writers—bear responsibility to refuse the norms of “mass media show business” and to revitalize research by “taking the interests of common people as a point of departure.” *Id.* at 29. KROM sought to undertake this work through its “strange hybrid” organization, comprised of “intellectuals and prisoners with a common cause.” *Id.* The hope is that, in the end, the alternative public space “may compete with the superficial public space of the mass media.” *Id.*

The inclination to be “wild” that Mathiesen attributes to Nordic-prison-movement work is one that those concerned with humane legal and political reform perhaps ought not resist—after all, the Right on Crime projects celebrated in Texas and elsewhere embrace a certain rogue wildness that progressive commentators and reformers often shy away from. For example, Sheriff Adrian Garcia of Harris County, Texas explained at a Right on Crime convening that he describes the “philosophy” of his office as “WAI,” in his words, “wild-ass ideas,” by which he means ideas that reflect the “courage to try new things.”²⁶²

One of the core ideas of the Nordic prison movement that was embraced by public officials in Finland is that crime is caused by one set of factors and high levels of incarceration by separate variables.²⁶³ Incarceration levels respond primarily to legislatively and judicially established sentencing law frameworks—that is, to sentencing policy and political choices—not to crime.²⁶⁴ The more recent experience of Finnish decarceration supports this general criminological conclusion that crime rates increase and drop according to dynamics independent of incarceration trends.²⁶⁵ As the figure below reflects, Finland’s crime rate roughly corresponded to other states in the region despite markedly different trends in imprisonment.

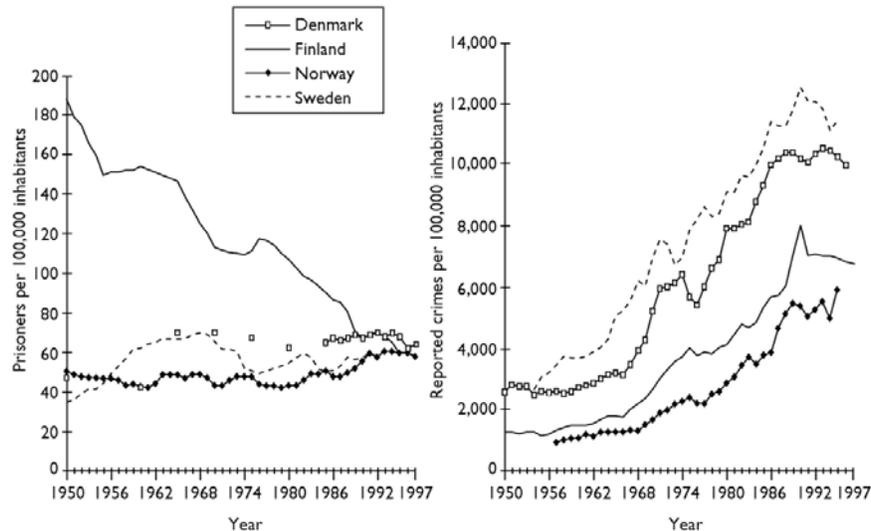
262. See TEX. PUB. POLICY FOUND., PRE-TRIAL AND MENTAL HEALTH POLICY IN HARRIS COUNTY, TEXAS: FRONT-END REFORMS THAT PROTECT CITIZENS, CONTROL COSTS, AND ENSURE JUSTICE 21 (2015).

263. See Lappi-Seppälä, *supra* note 24, at 111–22 (noting that crime rates and sentencing policies are practically independent of each other and describing Finland’s use of various methods—such as imposing shorter sentences, increasing the use of fines, and adopting community service as a new sanction—to lower incarceration rates).

264. See MICHAEL H. TONRY & RICHARD S. FRASE, SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 122 (2001); TRAVIS & WESTERN, *supra* note 33, at 3.

265. The notion that reform entailed a learning process led participants to view their work as unfinished, ongoing, and subject to revision, and created space for the involvement of researchers in the movement to engage in “action research” as part of their “research activity during ‘working hours.’” MATHIESEN, *supra* note 189, at 10. The concept of “the unfinished” is perhaps Mathiesen’s most significant contribution to social theory—the idea that unfinished, partial, in-process interventions open unique possibilities distinct from fully elaborated reformist alternatives. *Id.* This conceptualization served as a crucial foundation for Nordic abolitionist politics. *Id.*; see also Allegra M. McLeod, *Confronting Criminal Law’s Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 109–32 (2013).

Prison rates (*left*) and reported crime (*right*) in the Nordic countries, 1950–1997 (per 100,000 population).



Sources: von Hofer (1997); Lappi-Seppälä (1998).²⁶⁶

Of course, the Scandinavian abolitionist project has failed, but the prison movements succeeded at radically humanizing their countries' prisons—open prisons are within the norm; noncustodial nonreporting sentences are common; and even the most serious sentences are served in relatively comfortable conditions.²⁶⁷ The criminal law and policy of Finland, Norway, Denmark, and Sweden certainly suffer their own problems, excesses, and injustices too.²⁶⁸ For instance, in 2012, an influx of Roma people from Bulgaria and Romania to Norway, many of whom were so poor they sought to support themselves by begging in the street, resulted in a national clamor to adopt a forced prohibition on begging for all municipalities, to commence in 2015.²⁶⁹ Immigrants are imprisoned throughout the region at a rate that exceeds their representation in the population as a whole.²⁷⁰ And even in more comfortable environs,

266. Lappi-Seppälä, *supra* note 204, at 121.

267. See, e.g., *id.* at 100 (noting that one-quarter of prison places in Finland are in open conditions).

268. See Vanessa Barker, *Nordic Exceptionalism Revisited: Explaining the Paradox of a Janus-Faced Penal Regime*, 17 THEORETICAL CRIMINOLOGY 5 (2013) (exploring the extreme deprivations of liberty and violations of human rights that befall perceived outsiders in the Nordic welfare state, particularly foreign nationals).

269. See MATHIESEN, *supra* note 189, at 42 n.13.

270. See, e.g., MICHAEL CAVADINO & JAMES DIGNAN, PENAL SYSTEMS: A COMPARATIVE APPROACH 166 (2006) (noting that foreigners are overrepresented in Finnish prisons although

Scandinavian prisoners still experience thoroughgoing bodily control by others, all the more painful, perhaps, in the seeming absence of any visible, deliberately imposed discomfort.²⁷¹ Yet still, through the Parliament of Thieves and later Nordic prisoner-organized actions and reform, the prison movement demonstrated, at least for all of the Nordic countries, that it was “possible for *the bottom to surface*”—the title of the book on Swedish KRUM written by its founders—and for penal and social policy to fundamentally change.²⁷²

The purpose of this detour into Finnish and Scandinavian prison reform is not to suggest that the problems of the U.S. carceral state might be resolved as they have been in Finland, or that the United States ought to become more like one of the Nordic countries—a futile prospect in any case. The United States is considerably different from Finland in that it has a much larger and more diverse population, and a unique racial history that exerts an overwhelming influence on criminal law enforcement, local and national politics. Another set of differences relates to the relatively-less-significant role of experts and expertise in the U.S. criminal process and the disaggregation of decision making across hundreds of separate U.S. state and local jurisdictions.²⁷³ The United States will not solve its carceral problems in the same way as Finland, but we might nonetheless learn from their experiences. As James Whitman suggests of comparative law, the purpose of this comparative investigation is “to broaden the mind—to help us to escape the conceptual cage of our own tradition.”²⁷⁴ Here, more specifically, the aim is to recognize that we might address our growing

their absolute numbers are small); Lars Holmberg & Britta Kyvsgaard, *Are Immigrants and Their Descendants Discriminated Against in the Danish Criminal System?*, 4 CRIMINOLOGY & CRIME PREVENTION 125, 125–42 (2003) (finding that persons with a foreign background in Denmark are more likely to be arrested in relation to a charge, more likely to be remanded in custody without subsequently being convicted, and more likely not to be convicted when charged); Hans Von Hofer et al., *Minorities, Crime, and Criminal Justice in Sweden*, in MINORITIES, MIGRANTS, AND CRIME: DIVERSITY AND SIMILARITY ACROSS EUROPE AND THE UNITED STATES 62, 71 (Inke Haen Marshall ed., 1997) (reporting that all immigrant groups are overrepresented in conviction statistics when compared to indigenous Swedes).

271. See Jewkes, *supra* note 257, at 321, 323 (suggesting that experiments in aesthetically appealing penal architecture and design, such as in Norway’s new prisons, may represent a “more insidious form of control that brings its own distinctive pain, one all the more inhuman due to its apparent absence”).

272. MATHIESEN, *supra* note 189, at 17–19.

273. See Lappi-Seppälä, *supra* note 24, at 140–42 (noting that criminal justice policies in Finland are heavily influenced by experts and that consequently, unlike in the United States, criminal justice reform has been largely unaffected by politicization and lowbrow populism). Compare Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 222, 222–23 (Michael Tonry & Richard S. Frase eds., 2001) (describing the wide array of diverse experimental approaches to sentencing in U.S. jurisdictions), with Törnudd, *supra* note 234, at 189 (noting that sentencing policies in Finland have remained stable for a long time).

274. James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice*, 94 TEXAS L. REV. 933, 984 (2016).

discomfort in the United States with our own racialized penal practices with a genuine commitment to change. Just as some of the Finnish motivation to change may have arisen from a disidentification with historical Russian influence, so too, we in the United States might come to disidentify with the historical forms of shameful racial subordination that shape current criminal law enforcement among other practices. Further, dramatic decarceration, including with respect to those convicted of violent and dangerous offenses, does not necessarily threaten an epidemic of violent crime, because we learn that radical decarceration in Finland was followed by crime rates comparable to neighboring states that experienced opposite incarceration trends.

Indeed, a sustained commitment to decarcerate may generate deep-seated transformation over time by gradually substituting social projects like neighborhood revitalization, education, and social welfare provision for punitive surveillance and penal intervention, with an abolitionist orientation that relies on the least restrictive conditions of confinement only in those instances where penal intervention is absolutely necessary. Ultimately, Finland establishes that a carceral state may wither, and a social state may flourish in its stead. To invoke Whitman again, “[w]e *can* think differently—and that matters a great deal, because . . . we are going to have to think differently.”²⁷⁵

B. Black Lives Matter and Movements for Criminal Reform, Racial and Social Justice

While prison reform swept the Nordic countries, prisoner uprisings and social movements gripped the United States. But the reaction of prison authorities and other U.S. public officials was ultimately repressive rather than reconstitutive of penal policy.²⁷⁶

In late 1970, when scholar and activist Angela Davis was jailed, facing the death penalty for allegedly providing aid to a prisoner uprising in San Quentin prison, author James Baldwin wrote an open letter to Davis published in the *New York Review of Books*.²⁷⁷ Baldwin decried the absence of collective shame in the U.S. response to its penal policies and entwined practices of racial violence, as cited in the epigraph to this Essay:

275. *Id.*

276. See DAN BERGER, *CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA* 270 (2014) (describing the prison rebellions of the 1960s and 1970s leading to the prominence of solitary confinement); GOTTSCHALK, *supra* note 8, at 165 (“The United States gave birth to a prisoners’ rights movement that was initially more powerful and significant than prison reform movements that emerged elsewhere at roughly the same time. But the U.S. movement developed in ways that helped create conditions conducive to launching the ‘race to incarcerate.’”).

277. Baldwin, *supra* note 1, at 15.

One might have hoped that, by this hour, the very sight of chains on black flesh, or the very sight of chains, would be so intolerable a sight for the American people, and so unbearable a memory, that they would themselves spontaneously rise up and strike off the manacles. But, no, they appear to glory in their chains; now, more than ever, they appear to measure their safety in chains and corpses.²⁷⁸

Over the 1970s, African-American male unemployment in low-income communities grew to record proportions as a result of labor market restructuring, increasing from 25.9% to 40.7%.²⁷⁹ The U.S. carceral boom began in earnest, responding harshly to African-Americans accused of criminal offenses and often underenforcing the law against white people, with now all-too-familiar and highly racially and economically skewed effects.²⁸⁰

In the years to follow, police killed thousands of citizens in the United States, disproportionately people of color, and many of them—like Michael Brown, Tamir Rice, Eric Garner, Dontre Hamilton, Kendra James, LaTanya Haggerty, and Eleanor Bumpers—unarmed.²⁸¹ Responding to these and other related events, in the aftermath of the killing of Trayvon Martin, three African-American women activists—Alicia Garza, Patrisse Cullors, and Opal Tometi—created Black Lives Matter.²⁸² In the face of further awful deaths, Black Lives Matter has grown into a national and international movement.²⁸³

The Black Lives Matter movement's writings imagine another course of response to police violence and an alternative framework for decarceration. According to one affiliated movement effort, Ferguson Action:

278. *Id.*; ANGELA Y. DAVIS ET AL., IF THEY COME IN THE MORNING 13 (1971) (reprinting open letter from James Baldwin).

279. LISA MARIE CACHO, SOCIAL DEATH: RACIALIZED RIGHTLESSNESS AND THE CRIMINALIZATION OF THE UNPROTECTED 120 (2012) (citing Robert L. Wagniller, *Male Nonemployment in White, Black, Hispanic and Multiethnic Urban Neighborhoods, 1970-2000*, 44 URB. AFF. REV. 85, 100 (2008)).

280. *See, e.g.*, Vesla M. Weaver, *The Missing Lesson of Ferguson: Conduct ≠ Contact*, BALKANIZATION (Aug. 11, 2015), <http://balkin.blogspot.com/2015/08/the-missing-lesson-of-ferguson-conduct.html> [<http://perma.cc/5LB9-LCFF>].

281. *Id.*; Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 696 (1996) (documenting that African-Americans are disproportionately killed by police); Jon Swaine et al., *Black Americans Killed by Police Twice as Likely to Be Unarmed as White People*, GUARDIAN (June 1, 2015), <http://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis> [perma.cc/24AV-2HLX] (detailing an investigation finding that African-Americans in the United States are more than twice as likely to be unarmed when killed during encounters with police as white people and that 135 of 464 people killed in incidents with police in the first five months of 2015 were black).

282. *About*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> [<http://perma.cc/G94X-EUVH>].

283. *See supra* note 21 and accompanying text.

The United States Government must acknowledge and address the structural violence and institutional discrimination that continues to imprison our communities either in a life of poverty and/or one behind bars We want an immediate end to state sanctioned violence against our communities. . . . We want full employment for our people[.] Every individual has the human right to employment and a living wage. Inability to access employment and fair pay continues to marginalize our communities, ready us for imprisonment, and deny us of our right to a life with dignity. We want decent housing fit for the shelter of human beings[.] Our communities have a human right to access quality housing that protects our families and allows for our children to be free from harm. We want an end to the school to prison pipeline & quality education for all We want an end to the over policing and surveillance of our communities We call for the cessation of mass incarceration and the eradication of the prison industrial complex all together. In its place we will address harm and conflict in our communities through community based, restorative solutions.²⁸⁴

Other related “national demands” in these writings include a “[c]omprehensive [r]eview of systemic abuses by local police departments, including the publication of data relating to racially biased policing, and the development of best practices,” and hearings to investigate “the criminalization of communities of color, racial profiling, police abuses and torture by law enforcement.”²⁸⁵

The subsequently published *Vision for Black Lives*, authored by a collective of more than 50 organizations representing Black people across the county, imagines necessary change to criminal law enforcement in these terms:

We demand investments in the education, health and safety of Black people, instead of investments in the criminalizing, caging, and harming of Black people. We want investments in Black communities, determined by Black communities, and divestment from exploitative forces including prisons, fossil fuels, police, surveillance and exploitative corporations.²⁸⁶

We might recognize this reform framework as an effort to refuse and supplant prisons and punitive policing with other social projects—with employment, housing, quality education—as well as to proliferate mechanisms for restorative accountability. In the words of historian and

284. *Our Vision for a New America*, FERGUSON ACTION, <http://fergusonaction.com/demands/> [<http://perma.cc/WSN5-X269>].

285. *Id.*

286. See *A Vision for Black Lives: Policy Demands for Black Power, Freedom and Justice*, *supra* note 16.

prison activist Dan Berger, this may be understood as “reform in pursuit of abolition.”²⁸⁷ It is a call at once for “eradication of prison” and basic economic security, but also for more modest, practicable, immediately achievable ends: “publication of data relating to racially biased policing, and the development of best practices.”²⁸⁸ Andrea Smith, of INCITE!: Women of Color Against Violence, explains of contemporary U.S. prison-abolitionist discourse: “When we think about the prison abolition movement . . . it’s not ‘Tear down all prison walls tomorrow,’ it’s ‘crowd out prisons’ with other things that work effectively and bring communities together rather than destroying them.”²⁸⁹ An advocate with Decarcerate PA put it in these terms: “Abolition is a complicated goal which involves tearing down one world and building another.”²⁹⁰ Relatedly, the Movement for Black Lives recognizes that the human right to freedom from police and vigilante violence cannot be enjoyed without the human right to housing, education, and basic economic well-being.

This account of criminal law reform as related to economic security calls to mind W.E.B. Du Bois’s writings on the close connection in African-American historical experience between criminalization and economic dispossession. Du Bois began *The Souls of Black Folk* by identifying “the shades of the prison-house closed round about us all,”²⁹¹ and in *Black Reconstruction in America*, his masterwork, published several decades later, he condemned the failures of Reconstruction for having rendered African-Americans “caged human being[s].”²⁹² Du Bois recognized that a meaningful response to these conditions would include not just an absence of violence but some measure of economic security, which was actively refused during a period of U.S. history Du Bois explores in a chapter titled “Counter-Revolution of Property.”²⁹³ Freedom, yet to be realized in the accounts of Black Lives Matter and Du Bois, is envisioned simultaneously as positive and negative freedom—it is a freedom to be left alone but in conditions adequate for human flourishing. To thoroughly dismantle the carceral state will require that we imagine and begin to constitute a new state, a noncarceral state, a social state that better enables equality, freedom, economic justice, and human flourishing.

The Black Lives Matter movement offers an alternative political model seeking to achieve these ends—it is a dynamic, youth-led movement that rejects the familiar form of singular, charismatic leadership in favor of

287. Dan Berger, *Social Movements and Mass Incarceration*, 15 SOULS: CRITICAL J. BLACK POL. CULTURE AND SOC’Y 3, 14 (2013).

288. *Our Vision for a New America*, *supra* note 297.

289. Berger, *supra* note 299, at 59.

290. *Id.* at 134.

291. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 13 (1903).

292. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 12, 701 (1935).

293. *Id.* at 580.

locally dispersed, diverse, proliferating organizations and coalitions. Rather than seeking incorporation, the Black Lives Matter movement has adopted strategies of disruption that aim to enable us to see the world differently. Like Du Bois's analysis of carceral violence, the Black Lives Matter movement's calls for criminal law reform are not limited to the criminal domain but attempt to more fundamentally re-envision the role of the state, of emergent social movements, and of communities in ensuring collective security.²⁹⁴

Even if these more ambitious visions of decarceration remain relatively peripheral, they nonetheless offer a set of transformative aspirational ideas which might orient current reform efforts, rescuing more moderate criminal law reform from its weakest and most disappointing possible futures. If decarceration is ultimately to be part of egalitarian democratic political change, its champions will require a conception of the state beyond the carceral state and a more expansive coalitional politics that reaches further than the domain of criminal law and wider than the span of any narrow existing bipartisan consensus.²⁹⁵ This imaginative conjuring will not, of course, bring about desired transformation in itself, but any such alternatives will be foreclosed if we neglect to attend to them altogether.

Conclusion

At the end of her powerful and ruthless critique in *Caught*, Gottschalk gestures toward what she understands as necessary to “dismantle the carceral state and ameliorate other gaping inequalities”—what she describes as a “convulsive politics from below.”²⁹⁶ In Gottschalk's account, though, as in most of the scholarship on the carceral state, this convulsive politics is assumed to be absent from the contemporary scene, as are any significant prospects for substantial reform.²⁹⁷ Yet, the burgeoning movements for racial justice and criminal law reform may portend a convulsive politics from below already unfolding in our midst. This Essay has sought to locate provisional frameworks for decarceration that these and other efforts might deploy, by tactically engaging ongoing drug law and related reform, while

294. *E.g.*, Carla Shedd, Assistant Professor of Sociology and African-American Studies, *Women Mobilizing Memory: Collaboration and Co-Resistance*, Conference Proceedings at Columbia University (Sept. 10, 2015) (on file with author).

295. Relevant to this project are far-reaching matters of law reform and social policy—public welfare law, tax law, and the role of the state. See Tracy Meares, *A Third Reconstruction?*, BALKANIZATION (Aug. 14, 2015), <http://balkin.blogspot.com/2015/08/a-third-reconstruction.html> [<http://perma.cc/X5LP-YRPU>] (“[L]aw can do more. Redistribution, yes. But deep structural change in the law's orientation towards all citizens especially in the operation of the criminal justice system also is necessary.”). See generally, *e.g.*, EDWARD D. KLEINBARD, *WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY* (2015); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014).

296. GOTTSCHALK, *supra* note 2, at 282.

297. *Id.* at 276.

orienting near-term reform to the aspirational horizons conjured by Finland's dramatic decarceration and the Black Lives Matter movement's calls for criminal law reform as a project of racial, social, and economic justice.

What distinguishes these more transformative visions, both in the Black Lives Matter movement and in Finland, is the identification of criminal law reform not only with a fundamental shift in penal policy, but with a reorientation of the state and law more generally from punitive to social ends. Criminal law reform should connect decarceration to broader and deeper matters that define our economic and social lives so that we might begin to constitute a state beyond the carceral state.